CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

Bureau of Customs and Border Protection

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 40 **APRIL 19, 2006** **NO. 17**

This issue contains:

DEPARTMENT OF HOMELAND SECURITY
BUREAU OF CUSTOMS AND BORDER PROTECTION

NOTICE

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Bureau of Customs and Border Protection

General Notices

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS.
Washington, DC, April 5, 2006,

The following documents of the Bureau of Customs and Border Protection ("CBP"), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

SANDRA L. BELL,
Acting Assistant Commissioner,
Office of Regulations and Rulings.

19 CFR PART 177

MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF A TORQUE WRENCH, RATCHET, TOOL SET, AND SCREWDRIVER BIT AND SOCKET SET

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of modification of ruling letter and treatment relating to tariff classification of a torque wrench, ratchet, tool set, and screwdriver bit and socket set.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs and Border Protection ("CBP") is modifying a ruling letter pertaining to the tariff classification of a torque wrench, ratchet, socket set and screwdriver bit and socket set under the Harmonized Tariff Schedule of the United States

("HTSUS"). Similarly, CBP is also revoking any treatment previously accorded by it to substantially identical transactions. Notice of the proposed action was published in the Customs Bulletin on February 1, 2006. No comments were received in response to the notice.

EFFECTIVE DATE: This revocation is effective for merchandise entered or withdrawn from warehouse for consumption on or after June 18, 2006.

FOR FURTHER INFORMATION CONTACT: Ieva O'Rourke, Tariff Classification and Marking Branch, (202) 572–8803.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, Title VI, (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice was published in the Customs Bulletin on February 1, 2006, proposing to modify New York Ruling Letter (NY) K82360, dated January 15, 2004, which involved a torque wrench, ratchet, tool set, and screwdriver bit and socket set. No comments were received in response to the notice. As stated in the proposed notice, this modification will cover any rulings on the subject merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to those identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or deci-

sion or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), CBP is revoking any treatment it previously accorded to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Pursuant to 19 U.S.C. 1625(c)(1), CBP is modifying NY K82360, to reflect the proper classification of a torque wrench, ratchet, and screwdriver bit and socket set under heading 8466, HTSUS, specifically subheading 8466.10.80, HTSUS, as toolholders, and the tool set under heading 8204, HTSUS, specifically subheading 8204.20.00, as socket wrenches, with or without handles, drives, or extensions, in accordance with the analysis set forth in HQ 967400, which is set forth as the Attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP is revoking any treatment it previously accorded to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the Customs Bulletin.

Before taking this action, we will give consideration to any written comments timely received.

DATED: March 29, 2006

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

Attachment

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967400
March 29, 2006
CLA–RR:CTF:TCM 967400 IOR
CATEGORY: Classification
TARIFF NO. 8204.20.00, 8466.10.80

MR. JOHN CARRIER
CENTRAL PURCHASING, INC.
IMPORT OPERATIONS GROUP
3491 Mission Oaks Blvd.
Camarillo, CA 93012

RE: Torque wrench; ratchet; tool set; screwdriver bit and socket set; modification of NY K82360

DEAR MR. CARRIER:

This is in reference to New York Ruling Letter (NY) K82360, issued to you on January 15, 2004, by the National Commodity Specialist Division, regarding the classification, under the Harmonized Tariff Schedule of the United States ("HTSUS"), of two handtools and three handtool sets. We have reconsidered NY K82360 and have determined that the classification of the two handtools and two of the handtool sets is not correct.

In NY K82360, Customs and Border Protection (CBP) ruled that SKU 2696, a torque wrench, and SKU 40592, a ratchet, were classified in subheading 8204.20.00, HTSUS, as socket wrenches, with or without handles, drives, or extensions. SKU 04142, and 45785, tool sets, were classified in subheading 8207.90.60, HTSUS, which provides for interchangeable tools for handtools. Upon review, CBP has determined that the merchandise was erroneously classified in NY K82360. This ruling letter sets forth the correct classification determination.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed modification of NY K82360 was published on February 1, 2006, in the *Customs Bulletin*, Volume 40, Number 6. No comments were received in response to that notice.

FACTS:

SKU 40592 consists of a ratchet, ¼" drive, quick release, 5 ½" long. SKU 2696 consists of a torque wrench, ¼" drive, torque range 20 to 200 lbs., 10" long, in a molded plastic case. SKU 04142 consists of a 53 piece set containing a ⅜" drive with a ⅜ × ¼" adapter, 35 sockets, 6 allen hex keys, one 3" extension, 3 open end wrenches, one ratchet drive handle, and four screwdriver bits, all packed in a zippered toolholder with specific holders for each item. SKU 45785 consists of a 16 piece set containing one non-ratcheting drive handle with quick release, 2 Phillips head screwdriver bits, 2 slot head screwdriver bits, 6 star head screwdriver bits, one socket adapter, and a total of 9, ¼" drive sockets from 3/16" to ½" size, all in a plastic molded case.

ISSUE:

What is the correct classification of the subject merchandise?

LAW AND ANALYSIS:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

With respect to SKU 2696, the torque wrench, the HTSUS provisions under consideration are as follows:

8204	Hand-operated spanners and wrenches (including torque meter wrenches but not including tap wrenches); socket wrenches, with or without handles, drives or extensions; base metal parts thereof:
	Hand-operated spanners and wrenches, and parts thereof:
8204.11.00	Nonadjustable, and parts thereof.....
8204.12.00	Adjustable, and parts thereof.....
8204.20.00	Socket wrenches, with or without handles, drives and extensions, and parts thereof.....
8466	Parts and accessories suitable for use solely or principally with the machines of headings 8456 to 8465, including work or tool holders, self-opening dieheads, dividing heads and other special attachments for machine tools; tool holders for any type of tool for working in the hand:
8466.10	Tool holders and self-opening dieheads:
8466.10.80	Other.....

The legal text of heading 8204, HTSUS, includes torque meter wrenches among "hand-operated spanners and wrenches." A torque meter wrench can be set to apply a specific torque on bolts, nuts and other fasteners. Torque can be measured in ounce-inches, pound-inches, pound-feet, as well as metric measure. The subject wrench performs the same function as a torque meter wrench, measuring the torque in pound-inches. Torque meter wrenches are used with sockets. The wrenching action on the nut or bolt is performed by the sockets.

Heading 8204, HTSUS, is in section XV, HTSUS. Note 1(f) to section XV, HTSUS provides that articles of section XVI are not covered in section XV. Heading 8466, HTSUS, is in section XVI, HTSUS. Note 1(k) to section XVI, HTSUS, provides that articles of chapter 82 are not covered in section XVI, HTSUS. Note 1 to Chapter 82, HTSUS, provides that, with certain exceptions not applicable here, "this chapter covers only articles with a blade, working edge, working surface or other working part of (a) Base metal; (b) Metal carbides or cermets; (c) Precious or semiprecious stones (natural, synthetic or reconstructed) on a support of base metal, metal carbide or cermet; or (d) Abrasive materials on a support of base metal, provided that the articles have cutting teeth, flutes, grooves or the like, of base metal, which retain their identity and function after the application of the abrasive."

The predecessor provision to note 1 to Chapter 82, HTSUS (Schedule 6, part 3, subpart E headnote 1, Tariff Schedules of the United States (TSUS)) was the subject of the decision in Continental Arms Corp. v. United States, 65 Cust. Ct. 80 (1970). In Continental Arms, the classification under the Tariff Schedule of the United States (TSUS), of a "valvespot oiler" was at issue. In Continental Arms, the court considered what constitutes a working edge, surface or part, for the purpose of determining whether the oilers met the requirement of headnote 1. The court held that the term "working part" was used to refer to "that part of the tool which does work in relation to a workpiece or object external to the tool." The Court found that the spout in the valvespout is a passive conduit and does not work on an external object, and is therefore not a "working part" of the oiler.

Decisions by the Customs Service and the courts interpreting nomenclature under the HTSUS' predecessor tariff code, the TSUS, are not deemed dispositive under the HTSUS. However, on a case-by-case basis, such decisions should be deemed instructive in interpreting the HTSUS, particularly where the nomenclature previously interpreted in those decisions remains unchanged and no dissimilar interpretation is required by the text of the HTS. Omnibus Trade and Competitiveness Act of 1988, Public Law 100–418, August 23, 1988, 102 Stat. 1107, 1147; H.R. Rep. No. 576, 100th Cong., 2d Sess. 549–550 (1988); 1988 U.S.C.C.A.N. 1547, 1582–1583. The Continental Arms decision pertained to legal text which is substantially unchanged in the HTSUS, and no dissimilar interpretation is required by the text of the HTSUS. Accordingly, we find the decision instructive for purposes of the application of Note 1 to Chapter 82, HTSUS.

The torque wrench in this case, does not include a socket or sockets, and as such cannot operate on a nut or bolt. Therefore, without the socket, the torque wrench in this case does not have a "working part" within the meaning of Note 1 to Chapter 82, and as such, although specifically named in the text of heading 8204, HTSUS, cannot be classified in Chapter 82, HTSUS. As the torque wrench is not an article of Chapter 82, it is not precluded from classification in section XVI.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes (ENs), although not dispositive nor legally binding, provide a commentary on the scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The ENs to 84.66 (C) provide as follows, in pertinent part, with respect to tool holders for any type of tool for working in the hand:

> The very wide range of parts and accessories classified here includes:
>
> (1) Tool holders which hold, guide or operate the working tool and which permit the interchange of such tool-pieces. They are of varied types, e.g.:
>
> . . .
>
> This heading also includes tool holders for any type of tool designed for operation in the hand.

We find that the torque meter wrench, without sockets, is described in heading 8466, as it is a tool holder for sockets, which are designed for hand operation. Based on the language of heading 8466, HTSUS, the torque

wrench, SKU 2696, is classified in subheading 8466.10.80, HTSUS, as "[p]arts and accessories suitable for use solely or principally with the machines of headings 8456 to 8465, including work or tool holders, self-opening dieheads, dividing heads and other special attachments for machine tools; tool holders for any type of tool for working in the hand: Tool holders and self-opening dieheads: Other." The molded plastic case, is classifiable under subheading 8466.10.80, HTSUS, under GRI 5, if it is specially shaped or fitted to contain the torque wrench, suitable for long-term use and entered with the torque wrench. Otherwise the plastic case would be classified separately.

With respect to SKU 40592, ratchets have been consistently classified under heading 8466, HTSUS, which is set out above. Specifically, ratchets have been classified in subheading 8466.10.80, HTSUS, as tool holders. *See e.g.* Headquarters Ruling (HQ) 084551, dated August 9, 1989, HQ 089976, dated August 7, 1991, and HQ 964699, dated November 16, 2001. Although a ratchet is sometimes referred to as a "ratchet wrench" or "socket wrench," similar to the torque wrench described above, a ratchet does not have a "working edge" within the meaning of Note 1 to Chapter 82, and is precluded from classification in Chapter 82. Therefore, the ratchet, SKU 40592, is classified in subheading 8466.10.80, HTSUS, as "[p]arts and accessories suitable for use solely or principally with the machines of headings 8456 to 8465, including work or tool holders, self-opening dieheads, dividing heads and other special attachments for machine tools; tool holders for any type of tool for working in the hand: Tool holders and self-opening dieheads: Other."

With respect to SKU 04142 and 45785, the tool sets were correctly classified as sets under GRI 3. The classification of goods put up in sets for retail sale is governed by GRI 3(b). GRI 3(b) provides, in relevant part, that goods put up for retail sale shall be classified as if they consisted of the material or component which gives them their essential character. According to the ENs for GRI 3(b), "goods put up in sets for retail sale" refers to goods which "consist of at least two different articles which are, *prima facie*, classifiable in different headings; . . . consist of products or articles put up together to meet a particular need or carry out a specific activity; and . . . are put up in a manner suitable for sale directly to users without repacking".

With respect to SKU 04142, the items contained in the set, if entered separately, would be, *prima facie*, classified, with the 3/8″ drive and ratchet drive handle in subheading 8466.10.80, HTSUS, the adapter, 35 sockets and extension in subheading 8204.20.00, HTSUS, 6 hex keys and 3 open end wrenches in heading 8204.11.00, HTSUS, and four screwdriver bits in subheading 8207.90.60, HTSUS.

The factor or factors which determine essential character will vary with the goods. EN Rule 3(b)(VIII) lists as factors the nature of the material or component, their bulk, quantity, weight or value, and the role of a constituent material in relation to the use of the goods. There are more sockets than any other one article in the set, and numerous items in the set are for use with the sockets, such as the 3/8″ drive, the adapter and the extension. In this case, the factors of bulk, quantity, and role of a constituent material, indicate that the essential character of the set, in SKU 04142, is given by the sockets, which are classified under subheading 8204.20.00, HTSUS, as "[h]and-operated spanners and wrenches (including torque meter wrenches but not including tap wrenches); socket wrenches, with or without handles,

drives or extensions; base metal parts thereof: Socket wrenches, with or without handles, drives and extensions, and parts thereof."

With respect to SKU 45785, the items contained in the set, if entered separately, would be, *prime facie*, classified, with the drive handle in subheading 8466.10.80, HTSUS, the 10 screwdriver bits in subheading 8207.90.60, HTSUS, and the socket adapter and 9 sockets in 8204.20.00, HTSUS. For tool sets with drive handles and sockets and screwdriver bits, CBP has consistently held that under GRI 3(b), the essential character of the set is imparted by the drive handle or ratchet, based on the role of the drive handle or ratchet in relation to the use of the goods. *See e.g.* HQ 084551, *supra*, HQ 089976, *supra*, and NY J85063, dated June 16, 2003. The drive handle is necessary for the use of the screwdriver bits, sockets, and adapter.

Therefore for the tool set, SKU 45785, the essential character is imparted by the drive handle, and it is classified under heading 8466, HTSUS, accordingly. Specifically the tool set, SKU 45785, is classified under subheading 8466.10.80, HTSUS, as "[p]arts and accessories suitable for use solely or principally with the machines of headings 8456 to 8465, including work or tool holders, self-opening dieheads, dividing heads and other special attachments for machine tools; tool holders for any type of tool for working in the hand: Tool holders and self-opening dieheads: Other."

The zippered toolholder with specific holders for SKU 04142, is, specially shaped or fitted to contain the tool set, and is suitable for long-term use. Provided that it is entered with SKU 04142, it is classifiable under subheading 8204.20.00, HTSUS, in accordance with GRI 5. The plastic molded case for SKU 45785, is classifiable under subheading 8466.10.80, HTSUS, under GRI 5, if it is specially shaped or fitted to contain the set with which it is sold, suitable for long-term use and entered with the set. Otherwise the zippered toolholder and plastic case would be classified separately.

HOLDING:

By application of GRI 1, the torque wrench, SKU 2696, and ratchet, SKU 40592, are classified in heading 8466, HTSUS, specifically 8466.10.8075, HTSUSA, which provides for: "[p]arts and accessories suitable for use solely or principally with the machines of headings 8456 to 8465, including work or tool holders, self-opening dieheads, dividing heads and other special attachments for machine tools; tool holders for any type of tool for working in the hand: Tool holders and self-opening dieheads: Other . . . Other," with a column one, general duty rate of 3.9% ad valorem.

By application of GRI 3(b), the tool set, SKU 04142 , is classified in heading 8204, HTSUS, specifically 8204.20.0000, HTSUSA, which provides for: "[h]and-operated spanners and wrenches (including torque meter wrenches but not including tap wrenches); socket wrenches, with or without handles, drives or extensions; base metal parts thereof: Socket wrenches, with or without handles, drives and extensions, and parts thereof."

By application of GRI 3(b), the tool set, SKU 45785, is classified in heading 8466, HTSUS, specifically 8466.10.8075, HTSUSA, which provides for: "[p]arts and accessories suitable for use solely or principally with the machines of headings 8456 to 8465, including work or tool holders, self-opening dieheads, dividing heads and other special attachments for machine tools; tool holders for any type of tool for working in the hand: Tool holders and self-opening dieheads: Other . . . Other," with a column one, general duty rate of 3.9% ad valorem. Duty rates are provided for your convenience and

are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the internet at www.usits.gov/tata/hts/.

EFFECT ON OTHER RULINGS:

NY K82360, dated January 15, 2004, is modified with respect to the classification of SKU 2696, 40592, 04142 and 45785. The classification of the remaining item that is described in NY K82360 is unchanged.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

REVOCATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF ANTIMONY TRISULPHIDE

AGENCY: Bureau of Customs and Border Protection; Department of Homeland Security.

ACTION: Revocation of a tariff classification ruling letter and revocation of treatment relating to the classification of antimony trisulphide.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), this notice advises interested parties that Customs and Border Protection (CBP) is revoking one ruling letter relating to the tariff classification of antimony trisulphide under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). CBP is also revoking any treatment previously accorded by it to substantially identical merchandise. Notice of the proposed action was published on February 22, 2006, in Volume 40, Number 9, of the CUSTOMS BULLETIN. CBP received no comments in response to the notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after June 18, 2006.

FOR FURTHER INFORMATION CONTACT: Kelly Herman, Tariff Classification and Marking Branch: (202) 572–8713.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI") became effective. Title VI amended many sections of the Tariff Act of 1930, as

amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, notice proposing to revoke one ruling letter pertaining to the tariff classification of antimony trisulphide was published in the February 22, 2006, CUSTOMS BULLETIN, Volume 40, Number 9. No comments were received in response to the notice.

As stated in the proposed notice, this revocation will cover any rulings on this merchandise that may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised CBP during the notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in the notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY R01069, CBP ruled that antimony trisulphide was classified in subheading 2830.90.0000, HTSUSA, which provides for "Sulfides; polysulfides, whether or not chemically defined: Other." Since the issuance of that ruling, CBP has reviewed the classification of this item and has determined that the cited ruling is in error, and that the antimony trisulphide should be classified in subheading 2617.10.0000, HTSUS, which provides for "Other ores and concentrates: Antimony ores and concentrates."

Pursuant to 19 U.S.C. 1625(c)(1), CBP is revoking NY R01069 and any other ruling not specifically identified, to reflect the proper classification of antimony trisulphide according to the analysis contained in Headquarters Ruling Letter (HQ) 967661, set forth as an Attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. 1625 (c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

DATED: March 31, 2006

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

Attachment

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967661
March 31, 2006
CLA–2 RR:CTF:TCM 967661 KSH
TARIFF NO.: 2617.10.0000

JOSEPH R. HOFFACKER
BARTHCO TRADE CONSULTANTS
The Navy Yard
5101 S. Broad Street
Philadelphia, PA 19112

RE: Revocation of New York Ruling Letter (NY) R01069, dated December 8, 2004; Classification of antimony trisulphide.

DEAR MR. HOFFACKER:

This is in response to your letter of April 7, 2005, in which you request reconsideration of New York Ruling Letter (NY) R01069, issued to your client Asbury Graphite Mills, Inc., on December 8, 2004, concerning the classification under the Harmonized Tariff Schedule of the United States (HTSUS) of antimony trisulphide. The antimony trisulphide was classified in subheading 2830.90.0000, HTSUS, which provides for "Sulfides; polysulfides, whether or not chemically defined: Other." You assert that because the merchandise at issue is antimony ore it is classified in subheading 2617.10.0000, HTSUS, which provides for "Other ores and concentrates: Antimony ores and concentrates." CBP has reviewed the classification of this item and has determined that the cited ruling is in error. In reaching this determination, we have also considered your submissions of January 25, 2006 and January 30, 2006.

Pursuant to section 625(c), Tariff Act of 1930, (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of NY R00794 was

published in the Customs Bulletin, Vol. 40, No. 2, on January 4, 2006. No comments were received in response to the notice.

FACTS:

The antimony trisulphide is stibnite which contains 1% quartz. It is mined in Italy in open-pit and under-ground mines. The ores have a medium-high concentration of Antimony Trisulphide (40–60%). To separate the Antimony Trisulphide from gangue, ores are enriched using the typical mining method of ore-flotation process, in which the ores are crushed and powders are agitated with water containing a foaming agent and an agent to make the Antimony bearing particles water-repellent. These particles accumulate in the froth on the surface of the flotation tank, and this froth is skimmed off. The concentrates (65–69% Antimony Trisulphide) are dried and then grinded, using a hammer mill, to requested granulometry. The final product is bagged in 25 kg paper bags. The antimony trisulphide is imported to be sold to manufacturers of brake pads.

ISSUE:

Whether the antimony trisulphide is classified as a sulfide or polysulfide of heading 2830, HTSUS, or as an antimony ore or concentrate of heading 2617, HTSUS.

LAW AND ANALYSIS:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Harmonized Commodity Description and Coding System Explanatory Notes (EN), constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the EN provide a commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of the headings.

Heading 2617, HTSUS, provides for "Other ores and concentrates." The E.N. to heading 2617, HTSUS, provides the following in relevant part:

> The principal ores generally classified in this heading are:
>
> (1) **Antimony ores.**
>
> * * *
>
> (d) Stibnite (or antimonite), antimony sulphide
>
> * * *

Chapter Note 2 to Chapter 26, HTSUS, provides the following:

> For the purposes of headings 2601 to 2617, the term "ores" means minerals of mineralogical species actually used in the metallurgical industry for the extraction of mercury, of the metals of heading 2844 or of the metals of Section XIV or XV, even if they are intended for non-metallurgical purposes. Headings 2601 to 2617 do not, however, include minerals which have been submitted to processes not normal to the metallurgical industry.

Heading 2830, HTSUS, provides for "Sulfides; polysulfides, whether or not chemically defined." The E.N. to heading 2830, HTSUS, states that the heading covers metal sulphides including:

* * *

(9) **Antimony sulphides.**

(a) **Artificial trisulphide** (Sb_2S_3) . . .

* * *

The antimony trisulphide at issue is an ore which is intended for non-metallurgical purposes, i.e, brake pads. However, it is also a mineralogical species actually used in the metallurgical industry. Chapter Note 2 to Chapter 26, HTSUS, states that ores include minerals of mineralogical species actually used in the metallurgical industry for the extraction of mercury, of the metals of heading 2844 or of the metals of Section XIV or XV, **even if they are intended for non-metallurgical purposes**. Thus, the use of antimony trisulphide for brake pads does not disqualify it from classification in Chapter 26, HTSUS. The processing the antimony trisulphide undergoes, namely simple froth flotation, is a physical process of mineral segregation that does not result in any chemical or physical change to the either the ore or the gangue. The antimony trisulfide remains the same throughout its processing, packaging, and utilization in applications to which it is applied. The molecular and crystallographic structure and form are not altered in any way. As it has not been chemically modified, classification in heading 2830, HTSUS, is precluded. Pursuant to GRI 1, the antimony trisulphide is classified in heading 2617, HTSUS.

HOLDING:

The antimony trisulphide is classified in subheading 2617.10.0000, HTSUS, which provides for "Other ores and concentrates: Antimony ores and concentrates." The general column one rate of duty is Free.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the internet at www.usitc.gov.

EFFECT ON OTHER RULINGS:

NY R01069, dated December 8, 2004, is hereby revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the Customs Bulletin.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

19 CFR PART 177

PROPOSED REVOCATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF VIDEO MONITORS

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed revocation of ruling letter and treatment relating to tariff classification of video monitors.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs and Border Protection ("CBP") intends to revoke a ruling letter pertaining to the tariff classification of video monitors under the Harmonized Tariff Schedule of the United States ("HTSUS"). CBP also intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments are invited on the correctness of the proposed actions.

DATE: Comments must be received on or before May 19, 2006.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Regulations and Rulings, Attention: Trade and Commercial Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at Customs and Border Protection, 799 9th Street, N.W., Washington, D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Ieva O'Rourke, Tariff Classification and Marking Branch, (202) 572–8803.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, Title VI, (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obli-

gations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(1)), this notice advises interested parties that CBP intends to revoke a ruling letter pertaining to the classification of video monitors. Although in this notice CBP is specifically referring to the revocation of New York Ruling Letter (NY) L82966, dated March 10, 2005 (Attachment A), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final notice of this proposed action.

In NY L82966, set forth as Attachment A to this document, CBP classified a video monitor in subheading 8528.12.72, HTSUS, as: "[r]eception apparatus for television, whether or not incorporating radiobroadcast receivers or sound or video recording or reproducing apparatus; video monitors and video projectors: Reception apparatus for television, whether or not incorporating radiobroadcast receivers or sound or video recording or reproducing apparatus: Color: With a flat panel screen: Other: Other." It is now CBP's position that the video monitor is classified under subheading 8528.21.70, HTSUS, as "[r]eception apparatus for television, whether or not incorporating radiobroadcast receivers or sound or video recording or reproducing apparatus; video monitors and video projectors: Video monitors: Color: With a flat panel screen: Other: Other."

Pursuant to 19 U.S.C. 1625(c)(1), CBP intends to revoke NY L82966, and revoke or modify any other ruling not specifically identified in order to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed HQ 967768 (Attachment B). Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, we will give consideration to any written comments timely received.

DATED: April 3, 2006

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
NY L82966
March 10, 2005
CLA–2–85: RR: NC: 1:108 L82966
CATEGORY: Classification
TARIFF NO.: 8528.12.7201

MS. CATHIE TARSA
NEC/MITSUBISHI
500 park Blvd., Suite 1100
Itasca, Illinois 60143

RE: The tariff classification of an LCD monitor from China.

DEAR MS. TARSA:

In your letter dated February 9, 2005 you requested a tariff classification ruling.

The item in question is a 40-inch LCD monitor. It is denoted as the NEC-Mitsubishi LCD4010–IT–BK LCD monitor model. It is a TFT active matrix with a 40-inch screen diagonal measurement. It has a 1366x 768 resolution and a pixel pitch of .641mm for both high brightness and contrast. It also has a 16:9 aspect ratio and a viewing angle of 170 degrees.

It is stated that in its imported condition it does not have a television tuner nor can it decode video signals. An AV (audio/video) card can be incorporated, after importation, for the purpose of viewing video signals. The AV card will provide input connections for S-video, Y, Pb, Pr (component video), composite video and audio inputs. In its imported condition, it is stated, that this monitor is designed to meet a variety of display venues. They included public information kiosks; information displays at airports and train stations, electronic advertising, trade show displays, financial exchanges and industrial control and monitoring.

It is your opinion that this monitor should be classified under HTSUS heading 8471.60.4580 as an ADP display. This office is not of the same opinion. It is this office's opinion that HQ Ruling 966383 provides guidance in this instance for the terms of Chapter 84, Note 5(B)(A) have not been sufficiently satisfied. Therefore classification will be in accordance with the aforementioned Headquarters Ruling

The applicable subheading for the LCD monitor, model LCD4010–IT–BK, will be 8528.12.7201, Harmonized Tariff Schedule of the United States (HTS), which provides for Reception apparatus for television, whether or not incorporating radiobroadcast receivers or sound or video recording or reproducing apparatus; video monitors and video projectors: Reception apparatus for television, whether or not incorporating radiobroadcast receivers or sound or video recording or reproducing apparatus: Color: With a flat panel screen: Other: Other. The rate of duty will be 5 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Michael Contino at 646–733–3014.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967768
CLA–2:RR:CTF:TCM 967768 IOR
CATEGORY: Classification
Tariff No.: 8528.21.7001

MR. PETER T. MIDDLETON, ESQ.
MIDDLETON & SHRULL
44 Mall Rd., Suite 208
Burlington, MA 01803–4530

RE: NEC LCD 4010–IT monitor; NY L82966 revoked

DEAR MR. MIDDLETON:

This is in response to your letter of May 27, 2005, on behalf of NEC Display Solutions of America, Inc. (formerly NEC-Mitsubishi Electronics Display of America, Inc., and hereinafter referred to as "NEC"), concerning the classification under the Harmonized Tariff Schedule of the United States (HTSUS), of an NEC LCD 4010–IT monitor. Specifically, you request reconsideration of New York Ruling (NY) L82966, dated March 10, 2005, issued by the Customs and Border Protection (CBP), National Commodity Specialist Division. NY L82966 is incorrect and no longer represents the position of CBP on the classification of this merchandise.

FACTS:

The subject merchandise was described in NY L82966, as follows:

> The item in question is a 40-inch LCD monitor. It is denoted as the NEC-Mitsubishi LCD4010–IT–BK LCD monitor model. It is a TFT active matrix with a 40-inch screen diagonal measurement. It has a 1366x 768 resolution and a pixel pitch of .641mm for both high brightness and contrast. It also has a 16:9 aspect ratio and a viewing angle of 170 degrees.
>
> It is stated that in its imported condition it does not have a television tuner nor can it decode video signals. An AV (audio/video) card can be incorporated, after importation, for the purpose of viewing video signals. The AV card will provide input connections for S-video, Y, Pb, Pr (component video), composite video and audio inputs. In its imported condition, it is stated, that this monitor is designed to meet a variety of display venues. They included public information kiosks; information displays at airports and train stations, electronic advertising, trade show displays, financial exchanges and industrial control and monitoring.

Additional information provided with your submission of May 27, 2005, includes descriptive literature for the NEC MultiSync LCD4010–IT, an annotated diagram with instructions for attachment of the AV Board, a photograph of the AV Board, a block diagram of the LCD4010–IT–BK and AV Board, and schematic diagrams of the 3D Comb Decoder and the audio input. We note that some documents do not include the "BK" suffix for the model, and we refer to the article in issue as the LCD4010–IT.

The diagram of instructions for installation of the AV Board indicates that in order to install the AV Board a metal plate secured by screws must be removed from the back of the LCD4010–IT. Once the AV Board is installed it is secured with the same screws that secured the metal plate.

According to the product literature submitted, the LCD4010–IT has DVI–D, Analog D–sub, and Analog RGB (BNC) connectors. These same connectors are depicted on the block diagram of the LCD4010–IT. Product information for the NEC MultiSync LCD4010–BK–IT indicates the same connectors as the LCD4010–IT and that resolutions supported include NTSC/PAL, SECAM. 4.43 NTSC, and PAL60 HDTV. *See* http://www.monitoroutlet.com/M90121.html.

The photo of the AV Board shows that it has component video, s-video and audio inputs, speaker output, composite video input/output, audio input selector, audio amp., 16 MB SDRAM, a 3D comb video decoder, and a connector for the LCD4010–IT. The block diagram of the Av Board indicates the presence of an AMP filter, buffer, and sync separators. According to the submissions the LCD4010–IT without the A/V board has D–Sub mini 15 Pin, BNC, and DVI–D connectors.

Additional characteristics of the LCD4010–IT include brightness of 500cd/m2, input signal for video (analog RGB), separate synchronization, composite synchronization, and composite synchronization on green, and Rapid Response™ (stated to deliver uninterrupted video). Documented information on scan frequency and refresh rate is not provided.

In NY L82966, it was determined that the LCD4010–IT is classifiable under heading 8528, HTSUS, which provides for "[r]eception apparatus for television, whether or not incorporating radiobroadcast receivers or sound or video recording or reproducing apparatus; video monitors and video projectors." The LCD4010–IT was classified under the specific subheading 8528.12.7201, HTSUS, which provides for reception apparatus for television.

It is your position that the LCD4010–IT is classifiable under heading 8471, HTSUS, specifically subheading 8471.60.45, HTSUS, as "[a]utomatic data processing machines and units thereof . . . : Input or output units, whether or not containing storage units in the same housing . . . Other: Other: Other." You assert that the LCD4010-IT in its condition as imported is not capable of displaying anything other than a signal received from and processed through a computer base unit, and that the "IT" configuration of the imported unit is designed to be used as a display component for automatic data processing (ADP) machines. You state that the LCD4010-IT at the time of importation lacks the audio/visual (A/V) connections. You assert that the A/V connections are contained on a separate A/V board which is an option that the end user may choose to purchase separately. You assert that the 3D comb filter (referred to as a 3D comb decoder on the block diagram) scan converts the single television signal line into the 5 lines required by the monitor in order to display the picture and performs a critical function in processing the video/television signal in order to convert it to a form which the monitor can utilize.

You state that NEC intends to advertise and sell the LCD4010-IT primarily as an ADP monitor and estimate that 80% of the consumer sales will be in the "IT" category and 20% will be with the optional AV adapter board installed.

ISSUE:

Whether the NEC LCD4010-IT, 40-inch LCD monitor is classifiable as an ADP unit under heading 8471, HTSUS, or as reception apparatus for television or a video monitor under heading 8528, HTSUS.

LAW AND ANALYSIS:

Merchandise is classifiable under the HTSUS in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that most goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The HTSUS provisions under consideration are as follows:

8471	Automatic data processing machines and units thereof . . . :
8471.60	Input or output units, whether or not containing storage units in the same housing:
	Other:
	Other:
8471.60.45	Other . . . . .
8528	Reception apparatus for television, whether or not incorporating radiobroadcast receivers or sound or video recording or reproducing apparatus; video monitors and video projectors:
	Reception apparatus for television, whether or not incorporating radiobroadcast receivers or sound or video recording or reproducing apparatus:

8528.12 Color:

With a flat panel screen:

Other:

8528.12.72 Other .....

Video monitors:

8528.21 Color:

With a flat panel screen:

Other:

8528.21.70 Other .....

In NY L82966, the LCD4010-IT was classified under heading 8528, HTSUS. Although there did not appear to be an issue regarding the television reception capability of the monitor, it was classified under subheading 8528.12, HTSUS, which provides for reception apparatus for television. The correct classification in heading 8528, HTSUS, for the LCD4010-IT, which we agree does not have reception capability, should have been 8528.21, HTSUS.

We believe the analysis applied in HQ 966383, dated July 3, 2003, is applicable here. In HQ 966383 we initially addressed whether the criteria of Note 5(B) to chapter 84, HTSUS was met.

In order to be classified as an ADP output unit within heading 8471, HTSUS, the subject merchandise must meet the terms of Legal Note 5(B) to Chapter 84, HTSUS, which provides that:

> To be classified as an ADP output unit within heading 8471, HTSUS, the subject merchandise must meet the terms of Legal Note 5(B) to Chapter 84, HTSUS, which provides that:
>
> (B) Automatic data processing machines may be in the form of systems consisting of a variable number of separate units. Subject to paragraph (E) below, a unit is to be regarded as being a part of a complete system if it meets all the following conditions:
>
> (a) It is of a kind solely or principally used in an automatic data processing system;
>
> (b) It is connectable to the central processing unit either directly or through one or more other units; and
>
> (c) It is able to accept or deliver data in a form (codes or signals) which can be used by the system.

Note 5(B)(b) above is met as BNC, DVI and D-Sub connectors are compatible with connecting the monitor to an ADP central processing unit (CPU). Note 5(B)(c) is met as the synchronization inputs indicate the LCD4010-IT is capable of receiving a signal from a CPU. Such synchronization inputs can receive both a CPU and a video signal.

The question we are left with is whether the LCD4010-IT meets the terms of Note 5(B)(a) that it is "of a kind solely or principally used in an automatic data processing system." You assert that the decisions in HQ 966025, dated July 22, 2003, and HQ 966271, dated June 3, 2003, are applicable to the

facts set forth in this decision. In HQ 966025 and 966271, it was determined that Note 5(B)(a) was met because the monitors at issue, in their imported condition, were unable to receive video signals and could only accept an ADP signal. You also assert that the decision in HQ 966383, *supra*, is not applicable to the facts set forth herein. In HQ 966383, it was determined that because the monitor at issue was imported equipped with electronic components such as decoder chips, it can accept video signals. In HQ 966383, it was determined that the addition of the tuner post importation did not add any other electronics or components other than those necessary for television reception and connection to external audio/video sources.

We do not find that the documentation submitted substantiates the claim that the LCD4010-IT cannot accept a video signal in its condition as imported. The documentation regarding the AV Board does not support the claim that the AV Board contains all of the circuitry required to accept video signals. Our research indicates that the components in the AV Board enhance a video signal depending on its source, but are not required for the processing of a video signal. For example, a video decoder simply digitizes and decodes analog video formats into digital component video thereby improving the image on the screen. *See, e.g.*, TVP5160 video decoder, http://focus.ti.com. The DVI and BNC connectors are compatible with sources other than ADP machines. Even if they were not, the fact that the monitor is not equipped with connectors for video sources does not render the monitor unable to process a video signal. The capability to process a video signal exists within the circuitry of the monitor, whether or not the monitor is imported with the connectors. The product literature indicates a video signal input capability. No information is provided whether that literature pertains to the unit with or without the AV Board. We assume it is without, because the submitted product literature does not indicate the component, composite and S connectors, which are in the AV Board. In addition, we note that the similar model, LCD4010-BK-IT, is advertised as having the same connectors as the LCD4010-IT while also supporting various video resolutions such as NTSC/PAL, SECAM, etc.

The lack of the capability to process a video signal was the distinguishing factor in HQ 966025 and 966271 which resulted in classification under heading 8471, HTSUS. In this case, assertions have been made but not supported with regard to any other factors from which it could be determined that the LCD4010-IT is of the class or kind of merchandise that is solely or principally used in an ADP system. For example it is asserted that NEC intends to sell the LCD4010-IT primarily as an ADP monitor, and that 80% of the sales would be in the "IT" category. However, there is no documentation provided supporting these assertions.

Nevertheless, we will address the factors applicable to a determination of the class or kind of good to which the LCD4010-IT belongs. These factors may include: (1) the general physical characteristics of the merchandise; (2) the expectation of the ultimate purchasers; (3) the channels of trade in which the merchandise moves; (4) the environment of the sale (e.g. the manner in which the merchandise is advertised and displayed). *See* United States v. Carborundum Co., 63 C.C.P.A. 98, 102, 536 F.2d 373, cert denied, 429 U.S. 979, 50 L.Ed. 2d 587. 97 S.Ct. 490 (1976).

The general physical characteristics of the LCD4010-IT are that of a large video display with connectors suitable for ADP and video sources. The resolution and aspect ratio do not indicate characteristics specifically attribut-

able to either ADP use or multi-function monitor use. The brightness of 500 cd/m2 is at a level typically found in either ADP monitors or multi-function monitors. The Rapid Response™ feature appears to be for video purposes, and the monitor accepts a video signal. We do not have any documented information on the scan frequency or refresh rate and therefore cannot consider those factors. The only information provided with respect to the expectation of the ultimate purchasers is the product literature submitted. The product literature indicates use as a "large-screen display" for digital signage applications and providing an audience with "messages and images." The literature references "uninterrupted video" and a video input signal. We also note that, other than the literature provided with the submission, we were unable to independently obtain any product information on the specific model LCD4010-IT. No documented information regarding the channels of trade or environment of sale for the particular model, LCD4010-IT, is available.

Based on the information available there is insufficient evidence to show that the monitor is of a kind solely or principally used with an ADP system. We find that the LCD4010-IT does not meet the terms of Note 5(B) to Chapter 84, HTSUS.

CBP has consistently held that multimedia displays that contain the components necessary to display video signals are classified under heading 8528, HTSUS. *See, e.g.,* HQ 961466, *supra*, HQ 962557, *supra*, HQ 966270, dated June 3, 2003, and HQ 966383, *supra*. The subject monitor does not have a television tuner, as imported, and therefore cannot be classified under subheading 8528.12, as reception apparatus for television. As the monitor is capable of displaying video signals, it is classifiable under subheading 8528.21.70, HTSUS, as "[r]eception apparatus for television, whether or not incorporating radiobroadcast receivers or sound or video recording or reproducing apparatus; video monitors and video projectors: Video monitors: Color: With a flat panel screen: Other: Other."

HOLDING:

By application of GRI 1, the NEC 40-inch LCD monitor, LCD4010-IT, is classified in heading 8528, specifically in subheading 8528.21.7001, HTSUSA, as "[r]eception apparatus for television, whether or not incorporating radiobroadcast receivers or sound or video recording or reproducing apparatus; video monitors and video projectors: Video monitors: Color: With a flat panel screen: Other: Other" with a column one, general duty rate of 5% *ad valorem*. Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the internet at www.usitc.gov/tata/hts/.

EFFECT ON OTHER RULINGS:

NY L82966, dated March 10, 2005, is revoked.

MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

United States Court of International Trade

One Federal Plaza
New York, NY 10278

Chief Judge

Jane A. Restani

Judges

Gregory W. Carman
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton
Timothy C. Stanceu

Senior Judges

Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Clerk

Leo M. Gordon

Slip Op. 06–41

BERWICK INDUSTRIES, INC., Plaintiff, v. THE UNITED STATES, Defendant.

Court Nos. 96–01–00263
98–12–03189

[Upon classification of certain decorative bows, cross-motions for summary judgment denied.]

Dated: March 31, 2006

Neville Peterson LLP (*John M. Peterson*, *Maria E. Celis*, *Catherine Chess Chen* and *Laura Martino*) for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Mikki Graves Walser*); and Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection (*Sheryl A. French*), of counsel, for the defendant.

Memorandum & Order

AQUILINO, Senior Judge: The above-named plaintiff importer[1] commenced civil action 96–01–00263 as a test case pursuant to USCIT Rule 84(b) to challenge classification by the U.S. Customs Service of certain bows upon entry from the People's Republic of China under either heading 3926 of the Harmonized Tariff Schedule of the United States ("HTSUS") as "other articles of plastics" or heading 6307 as "other made up [textile] articles", dutiable at 5.3 or 7 percent *ad valorem*, respectively. Plaintiff's complaint is that that merchandise more appropriately landed under HTSUS heading 9505, "festive articles", and therefore should have been duty free upon entry into the United States. Defendant's answer disagrees with this position.

[1] Now known as Berwick Offray, L.L.C.

I

Following that joinder of issue, the plaintiff interposed a motion to enlarge the time for the action to remain on the reserve calendar pursuant to USCIT Rules 7 and 84, which motion was granted on the ground that the parties were "discussing the method in which the issues of the . . . action may best be resolved in an effort to conserve judicial resources". Plaintiff's Motion to Enlarge Time in Which Action May Remain on Reserve Calender, second page. Some two years later, the court requested that counsel apprise it of the matter's status. When another year and a half had passed, the court was constrained to inquire "why the above test case should not be dismissed . . . pursuant to USCIT Rule 41(b)". Plaintiff's counsel responded that they

> had refrained from active litigation of this matter pending final resolution of the *Park B. Smith* case, to determine if the resolution of that case might be dispositive of the classification of its Trim Time bows. While plaintiff believes that the Federal Circuit's decision in *Park B. Smith*[, *Ltd. v. United States*, 347 F.3d 922 (Fed.Cir. 2003),] favors its view regarding the tariff classification of Trim Time Bows, it does not appear that that decision will be dispositive of the classification of its merchandise.
>
> Furthermore, [the] *Park B. Smith* appellate decision is not yet final. The Federal Circuit is, as of this writing, considering a petition for reconsideration submitted in that case. . . . The Federal Circuit has remanded the matter to this Court, with directions for the Court to make further findings with respect to the merchandise there at bar.

Accepting this explanation, the court granted plaintiff's request for a scheduling conference, which was held shortly thereafter.

The parties were in agreement that the Federal Circuit's denial of plaintiff's petition for reconsideration in *Park B. Smith* effectively cleared the way for disposition of this test case. The court also inquired as to the status of plaintiff's seemingly-related action, CIT No. 98–12–03189, to which the plaintiff intimated the possibility of consolidation.

That initial reaction apparently faded prior to the drafting of the parties' proposed scheduling order, which continued to treat the two actions separately. The court Court Nos. 96–01–00263, 98–12–03189 Page 4 thereupon expressed its "displeasure over the lack of any proposal with regard to final disposition of CIT No. 98–12–0[31]89", and it also inquired "whether or not that void c[ould] be filled via default judgment". In response thereto, the plaintiff submitted a proposed scheduling order for that action.

Nonetheless, the undersigned remains uncertain why the parties have not consolidated or suspended the later-commenced action with

(or in the light of) the earlier-initiated test case. To borrow plaintiff's own words, "judicial resources can best be conserved by avoiding active litigation of multiple suits dealing with the same issue". Here, not only does the subject matter seem to be the same, so too the underlying legal issue, namely, whether plaintiff's merchandise should have been classified under HTSUS heading 9505 as "festive articles". *Compare* Complaint No. 98–12–03189 . . .

> 12. The festive bows: Veltex Perfect, Perfect Netting, and Trim-Time Bows are colored red, gold, silver, and tartan plaid, which are colors evocative of the Christmas season.
>
> 13. The festive bows are primarily ornamental in nature.
>
> 14. The festive bows are intended to be displayed and used during the Christmas holiday season, and are designed to contribute to the joy and festivity of the holiday.
>
> 15. Because they are designed and manufactured for the Christmas holiday season, the Veltex Perfect, Perfect Netting, and Trim-Time Bows are properly classifiable under HTS Subheading 9505.10.2500, as festive articles, specifically as articles for Christmas festivities: Christmas ornaments, other, other; or under HTS Subheading 9505.90.6000, as festive articles, specifically as other festive articles, other, other. Under these subheadings, these bows are entitled to enter the United States unconditionally free of duty. As products of the People's Republic of China, these festive bows are entitled to enter the United States without regard to any textile quota restrictions, and without the presentation at the time of entry of any textile visas. Customs erred in classification of such bows under HTS Subheadings 3926.40 or 6307.90.99. . . .

with Complaint No. 96–01–00263 . . .

> 5. The merchandise which is the subject of this case consists of certain "perfect bows" and "trim time" bows for festive occasions, which plaintiff imported into the United States at the Port of Newark, New Jersey.
>
> 6. The perfect bows are composed of textile materials, and are designed specifically for use as Christmas ornaments. The "trim time" bows are composed of polypropylene plastics materials, and polypropylene netting, and are specifically designed for use as festive articles, to be displayed in connection with certain holidays and festive occasions.
>
> * * *
>
> 14. The plastic and textile bows are properly classifiable under HTS subheading 9505.10.25, as "Festive, carnival or other

entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof; Articles for Christmas festivities and parts and accessories thereof; Christmas ornaments; Other", and are entitled to enter the United States unconditionally duty free.

15. Alternatively, the plastic and textile bows are properly classifiable under HTS subheading 9505.90.60, as "Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof; Other: Other:[",] and are entitled to enter the United States unconditionally duty free.

Given the foregoing, and in an effort to adhere to the principles set forth in USCIT Rule 1, the court will henceforth consider the above-numbered actions as if they have been consolidated. *See* USCIT Rule 42(a):

> When actions involving a common question of law or fact are pending before the court, . . . it may order all the actions consolidated . . . ; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

A

Indeed, the plaintiff has now interposed a motion for summary judgment accompanied by a required Statement of Material Facts Not in Dispute[2] combining the two actions, to wit:

A. Procedural History for Case Number 96–00263

1. From January 1995 through February 1995 and from July 1997 through September 1997, plaintiff imported the subject festive bows into the United States from the People's Republic of China.

2. Beginning January 1995 through February 1995, plaintiff entered the subject bows under cover of Newark, New Jersey Consumption Entries, 743–0053169–1, 743–0053251–7, 743–0053318–4, and 743–0053023–0. These entries liquidated in May and June of 1995.

3. Defendant[ ] U.S. Customs . . . , . . . classified the subject bows at liquidation under Subheadings 3926.40.00, 3926.90.9890, and 6307.90.99 of the . . . HTSUS[ ]. Subheading 3926.40.0000 described, "Other articles of plastics and articles of other materials of headings 3901 to 3914: Statuettes and

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[2] Complete capitalization deleted.

other ornamental articles," and goods that are classified therein are subject to a 5.3% import duty *ad valorem*. Subheading 3926.90.9890 described, "Other articles of plastics and articles of other materials of headings 3901 to 3914: Other:Other: Other," and imposes an import duty of 5.3% *ad valorem* on goods that are classified as such. Subheading 6307.90.99 described "Other made up articles, including dress patterns: Other: Other: Other: Other: Other." Goods entered under this subheading were subject to a textile quota and an import duty of 7% *ad valorem*.

4. On June 21, 1995, Berwick filed Protest number 1001–95–105544 objecting to the classification and duty assessed at the liquidation of the subject entries, and claiming classification under HTSUS Subheading 9505.10.2500, as "Festive, carnival or other entertainment articles. . . . : Articles for Christmas festivities and parts and accessories thereof: Christmas ornaments: Other" or under HTS Subheading 9505.90.6000, as "Festive, carnival or other entertainment articles . . [.]:Other: Other," enterable duty free.

5. On August 18, 1995, Customs denied Berwick's Protest. . . . On January 23, 1996, Berwick timely commenced case number 96–01–00263 before the Court of International Trade.

6. All duties were tendered prior to the commencement of this action.

B. Procedural History for Case No. 98–[ ]03189

7. From July 1997 through September 1997, plaintiff entered the subject merchandise under cover of New York Consumption Entries, 743–0060717–8, 743–0061145–1, 743–0061243–4, 743–0061188–1, 743–0061283–0, and 743–0060859–8. Customs liquidated these entries between May and July 1998, and classified the merchandise under HTS Subheadings 3926.40, and 6307.90.89, as other plastic articles and other made-up textile articles.

8. On August 18, 1998, Berwick filed a protest 1001–98–103164 objecting to the classification and duty assessed at liquidation of the subject entries and claiming classification under HTSUS Subheading 9505.10.2500, as "Festive, carnival or other entertainment articles. . . . : Articles for Christmas festivities and parts and accessories thereof: Christmas ornaments: Other" or under HTS Subheading 9505.90.6000, as "Festive, carnival or other entertainment articles . . [.]: Other: Other," enterable duty free.

9. On November 27, 1998, Customs denied Berwick's Protest . . . against the classification of festive bows on the

ground that Customs' classification was correct. Plaintiff Berwick timely commenced case number 98–12–03189 before the Court of International Trade on December 2, 1998.

10. All duties were tendered prior to the commencement of this action.

C. Description of Merchandise

11. Plaintiff's imported merchandise that are the subject of this action consist[ ] of three types of festive bows. Each bow manifests a decorative scheme consistent with the Christmas holiday season. The *Perfect Bow* is a festive bow that is flocked with acrylic on the front surface to give it a velvet texture and, once assembled, boasts fourteen (14) to twenty (20) loops. At retail, these bows are arranged within a green box in a festive display of green, plaid, and red. The *Holiday Classic Bow* is long, by design so that it can be extended vertically across a Christmas wreath or dangled gracefully from a mantle. Like the *Perfect Bow*, the *Holiday Classic Bow* is flocked with acrylic to give it a festive velvet texture, a characteristic associated with the Christmas holiday. The typical red large *Holiday Classic Bow*, made from a material ex as "Veltex," is designed to be used on a Christmas wreath, or hanging, unaccompanied, from a store window or the doorpost of a home. The *Trim-Time Bow* is an intricately designed bow with a large size tie at its center. This Christmas bow is sold exclusively in Berwick's Trim-A-Tree Line through Trim-A-Tree line departments at retail stores and special holiday retailers.

12. The *Perfect Bow*, *Holiday Classic Bow*, and *Trim-Time Bows* are designed, sold as and used as holiday decorations for home and commercial furnishings. The bows are principally used as holiday decorations for wreaths, Christmas trees, mantels, walls, and window-sills in addition to a variety of other holiday-related uses. The bows are sold in traditional Christmas colors like, red, gold, tartan plaid, silver and are sold exclusively during the Christmas season.[3] All of these bows feature a cord or tie at the center of the back of the bow, in order for the bow to be easily hung, by nail or thread, as an ornament or decoration. The subject items do not include adhesive mate-

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[3] Upon inquiry by the court at oral argument, plaintiff's counsel stated that there were no "white" bows at issue herein. Nonetheless, the physical exhibits provided by the defendant in Attachment A to the Supplemental Declaration of Joan Mazzola, specifically, items numbered PF3, PFN9, PFN40, PFR9, appear to be white or a variation thereof. *See also* Plaintiff's Statement of Material Facts Not in Dispute, para. 14; Plaintiff's Attachment B–4, unnumbered third, seventh and eleventh pages.

rial, tape, or any other means by which they may be affixed to objects.

13. As noted, the subject bows are principally designed for the purpose of creating a festive bow used for decorating a home or commercial space during the Christmas season. As such, the bows are made of either extruded polypropylene or wire-edged woven textile, fibers that, although sturdy, allow for more creative freedom than wood or steel. These materials are also water resistant, which allow them to be used as decorations outside the home. Further, the durability and weightlessness of these fabrics allow the decorative bows to be easily stored and re-used during subsequent holiday seasons.

The Perfect Bow

14. The *Perfect Bow*, depicted at Exhibit A, is designed primarily for the purpose of creating a festive bow that is used to decorate a home or commercial space during the Christmas season. It includes two strips that may be pulled to produce a bow with fourteen (14) to twenty (20) loops, an amount that far surpasses the number of loops in an ordinary, disposable ribbon. This bow is about 2″ – 8″ long, features ribbon about 2 inches wide, and is available in colors such as white, red, gold, silver, emerald, copper, navy, and champagne. The bow is made of Veltex which is extruded polypropylene with a flocked front surface. The flocked polypropylene gives the surface a heavy velvet appearance, which increases aesthetic appeal and facilitates the bow's use during the potentially harsh weather of December. The Veltex material also increases durability, which keeps the bow intact during use through the Christmas season, while in storage, and during subsequent holiday seasons.

15. Berwick's retail packages instruct that the *Perfect Bow* may be used for "Christmas trees," "home decorating," and "wreaths." Thus, the ultimate consumer would expect to use the article to create a Christmas ambiance in the home or store, by hanging it directly upon a house fixture, or by accessorizing a Christmas tree or wreath. Again, Berwick's retail display box for the *Perfect Bow* is green and the bows are arranged in a festive display of green, plaid, and red designs. Berwick's bows are sold in seasonal sections of general merchandise and craft stores, as well as the holiday catalogs of Berwick.

Holiday Classic Bows

16. The *Holiday Classic Bows*, shown at Exhibit B, are designed primarily for use as festive decorations during the celebration of Christmas, in the home or business. This festive bow ranges in size from 3″ – 22″ long and 3″ – 10″ wide. Berwick

fashioned its design to create a proportional fit with a Christmas wreath or tree. These bows feature two (2) to seven (7) loops and are available in red, green, gold, silver. Some bows depict images largely associated with Christmas, such as candy-cane stripes, hollies, etc. These bows are made from polypropylene ribbon, *i.e.* Veltex, plus acetate satin, vinyl, or PET/Polyester "Supersilk" material. Like the *Perfect Bow*, the *Holiday Classic Bow* was designed with a flocked polypropylene to give the surface a heavy velvet appearance, a design characteristic that increases aesthetic appeal and allows it to withstand the inclement weather if used to decorate the outside of a home during the winter months. The Veltex material also increases durability, which keeps the bow intact for use during the Christmas season, while in storage, and during subsequent holiday seasons.

17. The advertising brochure, at Exhibit B, depicts several uses for the *Holiday Classic Bow*: a red bow affixed to a wreath, hanging against an interior wall; and two red bows affixed against a mantle, beneath a green wreath. Advertised on the retail packages are the words, "Home Decorating." It follows that the ultimate purchasers of the bows would expect to use them as festive decorations. Their channels of trade include seasonal sections of general merchandise and craft stores, as well as Berwick's holiday catalogs.

Trim-Time Bows

18. The *Trim-Time Bows*, *depicted* at Exhibit C, are designed to be tied to home fixtures, e.g. mantles, Christmas trees, etc. and are typically use[d] with other festive decorations to bolster the spirit of the Christmas season. The *Trim-Time Bows* are highly decorative festive bows which are approximately 5″ – 20″ wide, 8″ – 20″ long, and feature intricately designed ribbons and ties. These bows are made of wire-edged woven textile and incorporate traditional Christmas colors of red and green plus a tartan plaid. The wire edges enable the bows to maintain their shape during each and subsequent holiday season. They are available in various colors like silver, gold, green, blue, burgundy, and in a holly pattern – a quintessential symbol of Christmas.

19. The *Trim-Time Bows* are sold exclusively as holiday decorations for wreaths in Berwick's Trim-ATree line to retail stores as well as special holiday retailers. These items are sold in the seasonal sections or festive product sections of retail stores. The ultimate purchaser would expect to use the bow as a decoration during Christmas, given that the advertisement on the Trim-Time Bow retail package . . . describes the item as "Home

Décor Bow" and suggests to consumers the following uses: "On the Mantelpiece;" "Over a Doorway;" "As a Centerpiece;" and "On a Window."

20. All of the subject bows are designed with two fabric strips that allow the items to be easily tied to wreaths, Christmas trees, or other fixtures as a hanging home ornament. That the bows are not designed with adhesive strips on the reverse-side preclude them from being easily affixed to gifts or packages. All of these bows are packaged on hanging cards with the term "Home Decorating" or with instructions on how to construct (for purposes of the *Perfect Bow*) or display the bow. The cover of Berwick's 2000 catalogue includes a photograph of its bows positioned on a platform, along with a miniature Christmas tree sculpture, several hanging holiday ornaments, poinsettias, and a figure bearing a Christmas theme. . . . These items are marketed as home decorating supplies in the holiday sections of supermarkets, craft stores, or department stores.

21. These bows are not intended to be used to wrap or decorate packages, because they are designed to be ornaments and big enough to decorate trees, rooms, mantels, wreaths, etc. Furthermore, they are not ribbons which can easily be tied around a package. To celebrate the Christmas Holiday, these bows are sold to provide merriment as they decorate the home, churches, storefronts, window displays, and all other areas requiring Christmas cheer.

22. Since these bows (1) are intended for use, (2) are used as ornaments and decorations during the holidays, and (3) are marketed as such, the subject merchandise should be classified under HTS Heading 9505 as festive articles.

Italics, boldface, and underscoring in original.

In its response, the defendant admits foregoing paragraphs 2, 5, 6, 8, and 10 but denies in sum and substance all of the others. It is, however, of some moment to emphasize defendant's averments as to the following:

15. Denies. Avers that, according to Plaintiff's Exhibit A, the Perfect Bow is "Great For Use On[ ] Baskets, Christmas Trees, Crafts, Floral Arrangements, Gift Packaging, Home Decor, [and] Wreaths." Further avers that the Perfect Bow is depicted as a bow on a gift box.

Holiday Classic Bows

16. Denies. . . . Avers that the pages depicting bows in Plaintiff's Exhibit B do not refer to [ ] any bows as "Holiday Classic Bows." Further avers that the descriptions and dimensions of

the articles depicted in Exhibit B (on the page marked "40") provide that the depicted articles are actually ribbons and not "bows" as alleged in this paragraph. Further avers that, based on the item numbers corresponding to the bows depicted, none of the bows depicted in Plaintiff's Exhibit B are the subject of these actions.

17. Denies. . . . Further avers that the depiction contained on the first page of Plaintiff's Exhibit B merely states "Veltex" and there is no indication that the articles depicted on that page are the articles at issue in these actions. Admits that retail packages depicted in Plaintiff's Exhibit B state "Home Decorating." . . .

Trim-Time Bows

18. Denies. . . . Avers that the depiction contained in Plaintiff's Exhibit C merely state[s] "Golden Shimmer" and do[es] not state "Trim-Time Bow." Further avers that there is no indication that the articles depicted in Plaintiff's Exhibit C are the articles at issue in these actions.

19. Denies that the retail packages depicted in Plaintiff's Exhibit C refer to the depicted articles as "Trim-Time Bows"; admits that the retail packages depicted in Plaintiff's Exhibit C state "Home Decorating." . . .

B

This response has been served and filed in conjunction with a cross-motion for summary judgment that contains defendant's own Additional Statement of Material Facts As To Which There Is No Genuine Issue To Be Tried[4], the most pertinent of which include:

5. Berwick has limited its causes of action to only those imported bows which are in the following colors: red, green, gold[,] silver and tartan plaid. . . . Therefore, it has abandoned its claims regarding all [other] bows contained in the entries.

* * *

6. Berwick has seven product retail divisions for the bows which it manufactures and sells: Christmas Retail, Trim Time Retail, Everyday Retail, Floral Wholesale, Craft Retail, Packaging Wholesale, and Custom. . . . These divisions cross-merchandise and market bows of a variety of materials, colors, and styles, i.e., bows sold in one division are also advertise[d] and sold through other divisions. . . .

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[4] Complete capitalization deleted.

7. Berwick's Christmas Retail Division offers product lines, such as Christmas Classic, Brilliance and Ribbon Magic, which sell ribbons and bows for Christmas packaging. . . .

8. Berwick's Trim Time Retail division offers bows for every decorating need and offers in color themes that trend with the home decor market. . . .

9. Berwick's Everyday Retail Division offers creative options for both gift packaging and party decor in a variety of colors, and these bows are similar to the bows in Berwick's Christmas Retail division. . . . Bows sold through this division are used for gift wrap, gift bags, balloons and party supplies. . . .

10. Berwick's Floral Wholesale division supports the floral distributors market. Berwick's Flora-Satin product category is offered through this retail division for every occasion. . . .

11. Berwick's Craft Retail division offers a wide range of bows designed to accessorize any craft project, "regardless of the season." The bows sold to the craft market include Veltex, Flora-Satin (printed and solid), Wraphia, curling ribbon, Perfect Bows, and Curl Swirls. . . .

12. As the world's largest manufacturer and distributor of decorative bows, Berwick sells bows yearround. . . .

13. Bows are decorative articles manufactured, marketed and sold year-round for a variety of purposes. . . .

14. Bows are principally used in connection with gift wrapping/packaging. . . .

15. Bows [are] made from a variety of material and marketed in many colors and patterns through many channels of trade year-round. . . .

16. Bows have a variety of uses, *e.g.*, decorating gifts, houses, rooms, corsages, plants, hanging baskets, floral arrangements, gift wrapping, pews and centerpieces. . . .

17. The bows at issue are manufactured, imported, marketed and sold in different colors.

18. Neither the styles, sizes, colors, nor other characteristics of the imported bows preclude their use as gift wrapping bows and/or at times of the year other than Christmas. . . .

19. None of the commercial papers describe the imported merchandise as being "Holiday Classic Bows."

Citations omitted.

In its response, the plaintiff admits paragraphs 16 and 17 but denies 5, 13–15, and 18. As for the others, the plaintiff:

> 6. Admits that Defendant's Exhibit 1 speaks for itself. Denies the remaining allegations. Avers that most of Berwick's Christmas bows are marketed during Christmas and in specific catalogs.
>
> 7. Admits and avers that the Christmas Retail Division not only sells Christmas packaging but Christmas decorations and ornament-like bows.
>
> 8. Admits and avers that Trim Time Bows at issue are designed for use as Christmas decorations.
>
> 9. Denies and avers that most of the subject merchandise is not offered in Berwick's Everyday Retail Division for gift wrap, gift bags, balloons, and party supplies. The Perfect Bow may be used for packaging but is principally designed to be used for home or other decor at such festive events as Christmas.
>
> 10. Admits and avers that the subject merchandise is not generally sold through the Floral Wholesale Division.
>
> 11. Admits and avers that the subject merchandise is not generally sold through the Craft Retail Division.
>
> 12. Admits and avers that plaintiff does not sell most of the subject Christmas bows year-round.
>
> 19. Admits that the invoices and entry papers do not mention "Holiday Classic Bows." However, avers that all the 1996 and 1997 Christmas Catalogs, as well as the packaging for the subject bows describe some of the imported merchandise as "Holiday Classic Bows."

II

Both parties contend that the matter at bar can be resolved via summary judgment. *See, e.g.*, Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment ("Plaintiff's Memorandum"), p. 8; Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and In Support of Defendant's Cross-Motion for Summary Judgment ("Defendant's Memorandum in Opposition"), p. 9. The court tested this thesis by subjecting them to oral argument. Alas, upon careful review and reflection, the court cannot concur. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986):

> . . . [S]ummary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.

Jurisdiction to hear and decide this matter is predicated upon 28 U.S.C. §1581(a) and §2631(a). The dispositive issue herein is whether plaintiff's bows are *prima facie* classifiable as "festive articles" under HTSUS heading 9505. If so, the contested classification would be erroneous on its face per Note 2(v)[5] of Chapter 39 and Note 1(t) of Section XI[6], both of which indicate that the tariff provisions thereunder do not cover "[a]rticles of Chapter 95". *See* General Rule of Interpretation 1:

> . . . [F]or legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes[.[7]]

A

To determine whether plaintiff's bows are classifiable under HTSUS heading 9505, the court must first ascertain the meaning of that tariff provision. *See, e.g., Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1352 (Fed.Cir. 2002). That inquiry is unnecessary herein as the meaning thereof, and more specifically, the term "festive articles", has been defined by the Court of Appeals most recently in *Russ Berrie & Co. v. United States*, 381 F.3d 1334, 1336 (Fed.Cir. 2004), quoting *Park B. Smith, Ltd. v. United States*, 347 F.3d at 927, in turn citing *Midwest of Cannon Falls, Inc. v. United States*, 122 F.3d 1423, 1429 (Fed.Cir. 1997), to wit:

> . . . [C]lassification as a "festive article" under Chapter 95 requires that the article satisfy two criteria: (1) it must be closely associated with a festive occasion and (2) the article is used or displayed principally during that festive occasion.

In *Russ Berrie*, the court found that

> [s]nowmen decorated with holly, ghosts, and witches' and monsters' heads are symbols that are *closely associated* with the Christmas and Halloween holidays and are *used principally* on those occasions.

381 F.3d at 1336 (emphasis added). In *Park B. Smith*, the Federal Circuit had stated that

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[5] Note 2(v) was formerly Note 2(u).

[6] Chapter 63 falls thereunder.

[7] "Section and Chapter Notes are not optional interpretive rules, but are statutory law, codified at 19 U.S.C. §1202." *Park B. Smith, Ltd. v. United States*, 347 F.3d 922, 926 (Fed.Cir. 2003) (citation omitted). *Cf. Midwest of Cannon Falls, Inc. v. United States*, 122 F.3d 1423, 1429 (Fed.Cir. 1997).

> articles with symbolic content associated with a particular recognized holiday, such as Christmas trees, Halloween jack-o-lanterns, or bunnies for Easter, are festive articles[,]

but those

> articles that might be associated with a particular holiday because of their color schemes, but having no symbolic content, such as a red and green plaid, do not meet the . . . criteria for festive articles under Chapter 95.

347 F.3d 929.

Given this meaning for "festive articles", this court can move to the second, factual inquiry articulated in *Rollerblade*, 282 F.3d at 1352, namely, whether the goods at issue herein land within that meaning — in other words, whether they satisfy the criteria enumerated above.

(1)

In an attempt to satisfy number (1), *supra*, the plaintiff presents three arguments, the first of which is that

> bows possess a historical association with Christmas. Symbolically, bows reflect the "spirit of brotherhood," and their use during the Christmas season suggests that humankind is "tied together with bonds of goodwill."

Plaintiff's Memorandum, p. 13, quoting Symbols of Christmas, *http://www.ywconnection.com/Holiday/pageHsymbolsofchristmas.html* (last visited March 31, 2006). This citation to an anonymous, presumably-personal, website hardly reveals how the "spirit of brotherhood" is actually bound to Christmas, whether one considers that holiday in the light of either its religious[8] origin or its current commercial significance.

Secondly, the plaintiff claims that "[t]oday, the bow is as ubiquitous a symbol of Christmas as the greenery it decorates". Plaintiff's Memorandum, p. 13. This broad generalization seems to derive solely from the following sentence: "Indeed, it is rare to see a Christmas wreath or garland without a large bow." *Id.* (citations omitted). While this could be true, the relevance thereof seems to attach to the second requirement—that the merchandise be used or displayed principally during a festive occasion. *See Russ Berrie & Co. v. United States*, *supra*.

Third, the plaintiff argues that "some of the *Holiday Classic* and *Trim-Time* bows display traditional Christmas symbols, such as

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[8] *See, e.g., Skoros v. City of New York*, 437 F.3d 1, 9–10, 28–29 & n. 24, 51–52 (2d Cir. 2006).

candy-cane stripes and holly"[9], to which end it also provides Physical Exhibit #1 (Trim-Time)[10] depicting what appear to be holly branches. For support, counsel reference paragraphs 7 and 9 of the affirmation of Tim Shearer. Neither, however, substantiates that any of the bows at issue "displays traditional Christmas symbols". Rather, paragraph 9, which discusses the physical characteristics of Holiday Classic bows, merely states that they "**may** feature patterns such as candy-cane stripes, holly, etc.", while number 7 makes no mention of candy-cane stripes, holly, or any other alleged traditional Christmas symbol. Emphasis added. *Cf.* Defendant's Exhibit 10, Supplemental Declaration of Joan Mazzola, para. 5:

> . . . Physical Exhibit #1 . . . has what appears to be a textile bow with a holly on it. However, I was not aware that any of the bows at issue here contained holly on them.

Nor does plaintiff's Attachment A, listing each bow individually by protest, entry, category, and item number, support such a conclusion.

Despite this inconsistency, and the seemingly tenuous evidence produced by the plaintiff as to the bows' being symbols of Christmas, at this stage in the action(s) the court cannot weigh that evidence or make credibility determinations with regard thereto. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255.

(2)

Should the plaintiff be able to substantiate that "closely associated" requirement at trial, it still must satisfy the second — that its goods are used or displayed principally[11], in other words, predominantly[12] or ordinarily[13], as festive decorations during the Christmas holiday. *Cf.* Plaintiff's Memorandum, pp. 14, 17–23; Plaintiff's Statement of Material Facts Not in Dispute, paras. 12–22. Here, this contention is not without challenge. Defendant's position is that the

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[9] Plaintiff's Memorandum, p. 12, citing Tim Shearer Affirmation, paras. 7, 9. *See also Russ Berrie & Co. v. United States*, 381 F.3d 1334, 1336 (Fed.Cir. 2004).

[10] Also displayed at the podium during oral argument.

[11] *See* Additional U.S. Rule of Interpretation 1(a):

> . . . [A] tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is principal use[.]

Principal use has been defined as a use "which exceeds any other *single* use". *Lenox Collections v. United States*, 20 CIT 194, 196 (1996) (italics in original).

[12] *See Warner-Lambert Co. v. United States*, 28 CIT ____, ____, 341 F.Supp.2d 1272, 1281 (2004), *aff'd*, 425 F.3d 1381 (Fed.Cir. 2005), quoting *Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1311 (Fed.Cir. 2003).

[13] *See Primal Lite, Inc. v. United States*, 182 F.3d 1362, 1364 (Fed.Cir. 1999).

bows at issue are principally used in connection with gift-wrapping.[14]

In support of their respective positions and in accordance with USCIT Rule 56(e), each party has submitted affidavits attesting to the principal use of the bows at issue.[15] Those affidavits primarily focus on the factors outlined in *United States v. Carborundum Co.*, 63 CCPA 98, 102, C.A.D. 1172, 536 F.2d 373, 377, *cert. denied*, 429 U.S. 979 (1976). *See* Plaintiff's Memorandum, pp. 17–23; Defendant's Memorandum in Opposition, pp. 20–26. Having studied those affidavits, namely, of Alice Wong and Joan Mazzola for the defendant; and of Tim Shearer, Bruce Kerr, and Stella Troman for the plaintiff, the court is unable to reconcile the competing statements[16] contained therein without a trial where the aforementioned affiants can be subjected to cross-examination, "which has been said to be the surest test of truth and a better security than the oath." *Hanover Ins. Co. v. United States*, 25 CIT 447, 458 (2001).

III

In view of the foregoing, the parties' cross-motions for summary judgment must be, and they hereby are, denied. Counsel are directed to confer and propose to the court on or before April 28, 2006 a schedule for trial of those issue(s) of fact which are not already agreed to herein and which cannot be stipulated to in a pretrial order.

So ordered.

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[14] *See* Defendant's Memorandum in Opposition, pp. 19–26; Defendant's Additional Statement of Material Facts As To Which There Is No Genuine Issue To Be Tried, paras. 7, 9, 13–14, 18; Defendant's Exhibit 10, Supplemental Declaration of Joan Mazzola, para. 6:

> . . . Bows are decorative articles used as a part of packaging, *i.e.*, gift-wrapping. For example, tissue paper is used in packaging as decoration and/or to protect the packaged article, but is not itself a package. Plastic sheets, which are often used in place of tissue paper, are likewise not a package but are used as part of the packaging system to protect the packaged article. Similarly, bows are not themselves packages, but are used in the process of packaging, including giftwrapping.

[15] Their positions were also well articulated by counsel at oral argument.

[16] *Compare, e.g.*, Defendant's Exhibit 10, Supplemental Declaration of Joan Mazzola, para. 8:

> . . . Based on the advertising and sales practices of . . . retailers, it is my opinion that bows, including the perfect bows and other bows at issue in this action . . . belong to a class or kind of bow that is principally used for packaging, including giftwrapping[,]

with Plaintiff's Memorandum in Opposition, Affirmation of Bruce Kerr, para. 13:

> . . . [T]hese bows are sold principally during the Christmas holiday season to decorate all manner of public and private spaces, including homes, churches, and storefronts.

Slip Op. 06–42

HONTEX ENTERPRISES, INC., D/B/A LOUISIANA PACKING CO., Plaintiff, v. UNITED STATES, Defendant, and CRAWFISH PROCESSORS ALLIANCE, THE LOUISIANA DEPARTMENT OF AGRICULTURE AND FORESTRY, AND BOB ODOM, COMMISSIONER, Def.-Ints.

Before: Richard K. Eaton, Judge
Court No. 00–00223

[United States Department of Commerce's Conclusion in the Final Results on Remand, affirmed]

Dated: April 3, 2006

Arent Fox Kintner Plotkin & Kahn, PLLC (*John M. Gurley*), for plaintiff.

Peter D. Keisler, Assistant Attorney General, Civil Division, United States Department of Justice; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Jeanne E. Davidson*, Deputy Director, International Trade Section, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David S. Silverbrand* and *Paul D. Kovac*); United States Department of Commerce, Office of Chief Counsel for Import Administration (*Marisa Beth Goldstein*), of counsel, for defendant.

Adduci, Mastriani & Schaumberg, LLP (*James Taylor, Jr.* and *John C. Steinberger*), for defendant-intervenors.

MEMORANDUM OPINION AND JUDGMENT

Eaton, Judge: This antidumping action is before the court following a third remand to the United States Department of Commerce ("Commerce" or the "Department"). *See* Final Results of Determination Pursuant to Court Remand (Dep't Commerce, Dec. 9, 2005) ("Final Results on Remand"). *See generally Hontex Enter., Inc. v. United States*, 29 CIT ___ , 387 F. Supp. 2d 1353 (2005) ("*Hontex III*"). Jurisdiction is had pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2000). For the reasons set forth below, the court affirms the "Conclusion" found in the Final Results on Remand.

BACKGROUND

The facts of this case have been set forth in the previous opinions of the court. *See Hontex III*, 29 CIT at ___ , 387 F. Supp. 2d at 1355–57; *Hontex Enter., Inc. v. United States*, 28 CIT ___ , ___ , 342 F. Supp. 2d 1225, 1226–28 (2004) ("*Hontex II*"); *Hontex Enter., Inc. v. United States*, 27 CIT ___ , ___ , 248 F. Supp. 2d 1323, 1325–28 (2003) ("*Hontex I*"). The facts relevant to the instant remand review are as follows.

On October 29, 1998, Commerce initiated an administrative review of the antidumping duty order covering crawfish tail meat from the People's Republic of China ("PRC"). *See* Initiation of Antidump-

ing and Countervailing Duty Admin. Review, Requests for Revocation in Part and Deferral of Admin. Review, 63 Fed. Reg. 58,009 (ITA Oct. 29, 1998). During that review, exporters Ningbo Nanlian Frozen Foods Company ("NNL")[1] and Huaiyin Foreign Trading Company (5) ("HFTC5") submitted questionnaire responses. *See, e.g.*, Sec. A Questionnaire Resp. of [NNL] and La. Packing Co. ("NNL Sec. A Resp."), Pub. R. Doc. 19 (Dec. 8, 1998); Sec. A Questionnaire Resp. of [HFTC5] ("HFTC5 Sec. A Resp."), Pub. R. Doc. 24 (Dec. 22, 1998). In their responses, both NNL and HFTC5 maintained that they shared neither managers or owners, nor common control, with other crawfish tail meat exporters. *See* NNL Sec. A Resp., Pub. R. Doc. 19 at 3; HFTC5 Sec. A Resp., Pub. R. Doc. 24 at 4. Despite this assertion, Commerce determined that a "web of control relationships [existed] between NNL and HFTC5," and that the two entities were affiliated and therefore should be "collapsed" and treated as a single entity. *See Hontex III*, 29 CIT at ___, 387 F. Supp. 2d at 1355–56 (citing Relationship of [NNL] and [HFTC5], Pub. R. Doc. 218). Based on this finding, Commerce assigned HFTC5's PRC-wide antidumping duty rate of 201.63% to NNL. *Id.* Although claiming a "web of control relationships," Commerce's determination was based solely on the business activities of a "Mr. Wei,"[2] who was at various times an employee of each company. *Id.*

As a domestic importer of the subject merchandise, plaintiff Hontex commenced this action challenging aspects of Commerce's determinations, including Commerce's decision to collapse the companies.[3] *See generally Hontex I*. The matter was ultimately remanded in *Hontex I*, and further redeterminations and remands followed thereafter. *See generally Hontex II, and Hontex III*.

In *Hontex I*, *Hontex II*, and *Hontex III*, this court found, *inter alia*, that substantial record evidence did not support Commerce's determination that NNL and HFTC5 should be collapsed. *See Hontex III*, 29 CIT at ___, 387 F. Supp. 2d at 1359; *Hontex II*, 28 CIT at ___, 342 F. Supp. 2d at 1236–37; *Hontex I*, 27 CIT at ___, 248 F. Supp. 2d at 1343–44. As a result, the court, in each instance, remanded the matter so that Commerce might marshal more evidence to support its conclusion. *See Hontex III*, 29 CIT at ___, 387 F. Supp. 2d at 1361; *Hontex II*, 28 CIT at ___, 342 F. Supp. 2d at 1246; *Hontex I*, 27 CIT at ___, 248 F. Supp. 2d at 1350.

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[1] It should be noted that a "Mr. Lee" is the part-owner of NNL. *See* Verification Report for [NNL] in the Antidumping Duty Review of Freshwater Crawfish Tail Meat from the PRC, Pub. R. Doc. 188 at 5–10. He has, however, no ownership interest in HFTC5.

[2] Also known as "Mr. Wei Wei."

[3] As a domestic importer of the subject merchandise, Hontex is an "interested party" within the meaning of 19 U.S.C. § 1677(9)(A), and is entitled to challenge Commerce's determination pursuant to 19 U.S.C. § 1516(a)(2).

STANDARD OF REVIEW

When reviewing a final determination in an antidumping or countervailing duty investigation, "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law. . . ." 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "Substantial evidence is more than a mere scintilla." *Consol. Edison*, 305 U.S. at 229. The existence of substantial evidence is determined "by considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Huaiyin*, 322 F.3d at 1374 (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)).

DISCUSSION

As noted by the court in *Hontex III*, the theory in support of collapsing NNL and HFTC5, to that time, had not been "entirely clear." *See Hontex III*, 29 CIT at ____ , 387 F. Supp. 2d at 1358. At oral argument, however, counsel for Commerce explained the Department's position: "Mr. Wei Wei had the potential to control both companies and . . . Mr. Wei Wei is an agent of Mr. Lee. Therefore, if you follow the logic . . . Mr. Lee would have a potential to control both companies through Mr. Wei Wei." Oral Arg. Tr. of 3/30/2005 at 33. Based on this representation, the court in *Hontex III* reexamined the evidence and concluded that nothing on the record indicated that Mr. Wei was acting as Mr. Lee's agent at HFTC5.[4] *See Hontex III*, 29 CIT at ____ , 387 F. Supp. 2d at 1360–61. Specifically, the court found that:

> An examination of the record reveals that there is neither: (1) evidence of Mr. Lee ever actually exercising control over Mr. Wei at HFTC5; nor (2) any evidence of Mr. Lee's potential to control Mr. Wei's activities at that company. Indeed, while Commerce provides great detail as to Mr. Wei's activities on behalf of HFTC5, none of this evidence links Mr. Lee to Mr. Wei's activities at that company. *See, e.g.*, NNL Verification Memo, Pub. R. Doc. 188 at 5–7. . . . [C]ounsel's comments at oral argument highlight the flaw in Commerce's reasoning: there is simply no evidence on the record of this antidumping review that Mr. Wei

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[4] The only evidence of anyone having control over Mr. Wei's activities at HFTC5 is that he took orders from an individual identified solely as HFTC5's "general manager." There is no evidence, or even a suggestion, that Mr. Lee was HFTC5's general manager. *See Hontex III*, 29 CIT at ____ , 387 F. Supp. 2d at 1360.

> was acting as Mr. Lee's "agent" at HFTC5. While there is ample evidence that Mr. Lee was acquainted with Mr. Wei and that Mr. Wei was working as Mr. Lee's "agent" at NNL, this evidence does not support a further inference that Mr. Wei was working as Mr. Lee's "agent" at HFTC5. Therefore, substantial evidence does not support the conclusion that Mr. Lee "controlled" HFTC5.

Id. at 1360–61.

That being the case, the court remanded the matter to Commerce with instructions to either:

> (1)(a) find that Mr. Lee did not control HFTC5 within the meaning of 19 U.S.C. § 1677(33)(F) & (G), and (b) find that NNL and HFTC5 were not affiliated, and (c) find that NNL and HFTC5 should not be collapsed and given a single antidumping margin, and (d) find that NNL is entitled to a separate company-specific antidumping margin and calculate that margin using the verified information on the record; or (2)(a) reopen the record in order to gather additional evidence of Mr. Lee's control relationship with HFTC5 during the period of review, and (b) place such additional information on the record, and (c) conduct an analysis that takes into account any such new evidence, including the temporal aspect of any such new evidence.

Id. at 1361. Thus, Commerce was given the choice of two courses of action, i.e., either find that the companies were not affiliated or reopen the record. The Final Results on Remand, however, demonstrate that it chose neither. Rather, while Commerce states in its Conclusion, that it has now found that: (1) Mr. Lee did not control HFTC5; (2) NNL and HFTC5 were not affiliated and therefore should not be collapsed; and (3) NNL is entitled to a separate company-specific antidumping margin, and calculated that margin using the verified record information, it further states that this determination is made only "for the purpose of these remand results." Final Results on Remand at 2. This statement is followed by extensive argument justifying its previous conclusion that the companies should be collapsed. In sum, Commerce argues that collapsing the companies was authorized because Mr. Wei was an employee of both companies. This position is, of course, different from that presented by the Department's counsel in open court. Moreover, although Mr. Wei was an employee of NNL, there is no evidence that he in any way controlled the company since, at all times, his NNL activities were directed by Mr. Lee.[5]

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[5] It is worth noting that Mr. Wei had no ownership interest in either company.

As to the nature of the Final Results on Remand, the course of action adopted by Commerce is simply not in accordance with this court's remand instructions. "Neither of the[ ] choices on remand permit Commerce to affect to adopt the court's conclusions . . . without actually doing so." *Fuyao Glass Indus. Group Co. v. United States*, 30 CIT ___, ___, slip op. 06–21 at 7 (Feb. 15, 2006) (not published in the Federal Supplement); *see also Vertex Int'l, Inc. v. United States*, 30 CIT ___, slip op. 06–35 at 1 (Mar. 8, 2006) ("The Department must adhere closely to the court's outstanding orders. Failure to do so unnecessarily absorbs the time of counsel and the court, [and] does not promote respect for the rule of law. . . ."). Therefore, the court finds the Summary and Discussion sections of the Final Results on Remand are not in accordance with the remand instructions. As a result, those portions of the Final Results on Remand are to be stricken.

Nonetheless, as has been demonstrated by the court's discussion herein, Commerce's Conclusion is supported by substantial evidence and otherwise in accordance with law. As a result, that portion of the Final Results on Remand shall be affirmed.

JUDGMENT

Therefore, in accordance with the foregoing discussion, the court hereby: (1) strikes from the Final Results on Remand the portions labeled "Summary" and "Discussion" as inconsistent with the remand instructions found in *Hontex III*; and (2) affirms Commerce's Conclusion found in the Final Results on Remand as being supported by substantial evidence and otherwise in accordance with law.

Slip Op. 06–43

DECCA HOSPITALITY FURNISHINGS, LLC, Plaintiff, MARIA YEE INC., Plaintiff-Intervenor, v. UNITED STATES, Defendant, AMERICAN FURNITURE MANUFACTURERS COMMITTEE FOR FAIR TRADE, Defendant-Intervenor.

Before: Pogue, Judge
Court No. 05–00002

[Writ of mandamus granted]

OPINION

POGUE, Judge: Responding to the court's opinion in *Decca Hospitality Furnishings, LLC v. United States*, 29 CIT ___, 391 F. Supp. 2d 1298 (2005) ("*Decca I*"), Commerce determined on remand that

Plaintiff, Decca Hospitality Furnishings, LLC ("Decca"), was entitled to a 6.65% cash deposit rate instead of the 198.08% "PRCwide" rate assigned to Decca in Commerce's original determination. After remand, on December 20, 2005, the court entered judgment affirming Commerce's remand determination. Decca now moves the court to enforce the judgment entered after remand and, by consequence of enforcing that judgment, to order Commerce to correct Decca's cash deposit rate to reflect Commerce's Remand Determination; alternatively, Decca asks the court to issue a writ of mandamus compelling Commerce to implement the lawful cash deposit rate. For the reasons set forth below, the court grants Plaintiff's alternative request for mandamus relief.

BACKGROUND

A.

Under the antidumping statute ("the Statute"), 19 U.S.C. §§ 1673a (2000) *et seq.*, Commerce is charged with investigating allegations of dumping by foreign producers or importers, and, if dumping is found, to counter the effects of such dumping by ordering a duty on dumped imports, i.e., an antidumping duty.[1] In the course of an investigation, Commerce may, at different times, estimate the rate of antidumping duty that will ultimately be assessed. The initial estimate follows an affirmative preliminary determination that dumping has occurred. 19 U.S.C. § 1673b(d). Pursuant to this initial estimate, Commerce instructs the Bureau of Customs and Border Protection ("Customs") to collect estimated duties, sometimes referred to as "cash deposits," on entries of the merchandise that is subject to investigation. 19 U.S.C. § 1673b(d)(1)(B). *See also* 19 C.F.R. § 351.205; *Torrington Co. v. United States*, 44 F.3d 1572, 1577–78 (Fed. Cir. 1995); *Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973, 976–77 (Fed. Cir. 1994).[2] After Commerce completes its investigation, it issues a final determination which may (and usually does) adjust Commerce's initial estimate. 19 U.S.C. § 1673d(c)(1)(B)(ii); *see also* 19 U.S.C. §§ 1673e(a)(3), 1673e(c)(3); *Cambridge Lee Indus. v. United States*, 916 F.2d 1578, 1579 (Fed. Cir. 1990). This final determination is implemented in the antidumping duty order. *See Am. Lamb Co.*, 785 F.2d at 999.

As mentioned, the cash deposit rate is merely an estimate of the eventual liability importers subject to an antidumping duty order will bear. Because the rate established by the final determination is based on past conduct, i.e., conduct occurring before the final deter-

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[1] For a more thorough discussion of the administrative process see *Tex. Crushed Stone Co. v. United States*, 35 F.3d 1535, 1536–37 (Fed. Cir. 1994); *Am. Lamb Co. v. United States*, 785 F.2d 994, 998–99 (Fed. Cir. 1986).

[2] Commerce also requires that "liquidation" be suspended. *See infra* at pp. 5–6.

mination, interested parties to an antidumping duty proceeding may ask Commerce to annually review the antidumping duty order in light of an importer's current practices. *See* 19 U.S.C. § 1675; *Asociacion Colombiana de Exportadores de Flores v. United States*, 903 F.2d 1555, 1559 (Fed. Cir. 1990); *Floral Trade Council of Davis, Cal. v. United States*, 888 F.2d 1366, 1369 (Fed. Cir. 1989). The process of review, called an "administrative review," establishes the actual liability the importer bears. 19 C.F.R. § 351.213.[3]

If no review is requested, the rate found in the final determination is the rate at which liability is assessed. *See Consol. Bearings Co. v. United States*, 412 F.3d 1266, 1270–71 (Fed. Cir. 2005); *Kemira Fibres Oy v. United States*, 61 F.3d 866, 868–69 (Fed. Cir. 1995); *Cambridge Lee Indus.*, 916 F.2d at 1579. However, if a review is requested, Commerce determines what, if any, dumping has actually occurred for goods entered for a certain time (the "period of review"). *See Torrington Co.*, 44 F.3d at 1577–79; 19 C.F.R. § 351.213.

If the administrative review finds that the final determination understated the level of dumping, the importer must pay, in addition to the cash deposits already collected, the difference between the results of the administrative review and the results of the final determination, plus interest. 19 U.S.C. §§ 1673f(b)(1), 1677g; *see also Torrington Co.*, 44 F.3d at 1578–79. However, if the administrative review reveals that the importer owes less than what Customs holds in cash deposits, Customs must refund this difference plus interest. 19 U.S.C. § 1673f(b)(2). The administrative review also determines the cash deposit rate to be applied until the next administrative review. *See* 19 U.S.C. § 1675(a)(2)(C); *Allegheny Ludlum Corp. v. United States*, 346 F.3d 1368, 1372–73 (Fed. Cir. 2002); *Zenith Elecs. Corp. v. United States*, 884 F.2d 556, 558 (Fed. Cir. 1989).

Once the actual rate of dumping for particular goods is established through an administrative review, Commerce instructs Customs to collect the required duties, or refund any monies owed, for the goods imported during that period. "Liquidation," which is the final assessment and collection of duties,[4] *see Olympia Indus., Inc. v. United*

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[3] "In an administrative review, Commerce recalculates the relevant variables to determine whether a foreign company is continuing the practice of dumping, i.e., selling its merchandise in the United States for less than a foreign like product in its home market." *NTN Bearing Corp. v. United States*, 295 F.3d 1263, 1266 (Fed. Cir. 2002); *Torrington Co.*, 44 F.3d at 1578 ("The administrative review effectively updates the antidumping duty order."). Without administrative reviews, importers bent on dumping would be free to dump at rates above the final determination; at the same time, importers that wish to bring their conduct within bounds of U.S. dumping laws would have no incentive to stop dumping. *See also* 19 C.F.R. § 351.212 ("Unlike the systems of some other countries, the United States uses a 'retrospective' assessment system under which final liability for antidumping and countervailing duties is determined after merchandise is imported.")

[4] As noted, while it is Customs that collects duties at liquidation, it is Commerce that instructs Customs as to the proper rate of duty whether the rate of duty is a rate to be used for cash deposits or a rate to be used for liquidation.

States, 30 CIT ___ , ___ Slip. Op. 06–04, 6 n.1 (Jan. 6, 2006) (citing C.F.R. § 159.1 (2000); *Ammex, Inc. v. United States*, 419 F.3d 1342, 1345 n.1 (Fed. Cir. 2005)), occurs only once for each entry of goods, and, for the most part, may not be subsequently undone, *see Cambridge Lee Indus.*, 916 F.2d at 1579 (Fed. Cir. 1990) ("Once an entry has been liquidated, the duties paid cannot be recovered even if the payor subsequently prevails in its challenge to the antidumping order."); *Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983) ("*Zenith*").

Because liquidation may not, in most cases, be subsequently undone, it is "suspended" until such time as a party may request an administrative review, and during the pendency of any such review. *See* 19 U.S.C. § 1673b(d)(2); 19 C.F.R. § 351.211(b)(3). *See also Micron Tech. Inc. v. United States*, 117 F.3d 1386, 1391 (Fed. Cir. 1997). Additionally, this court may also enjoin liquidation during the pendency of court proceedings. *See, e.g.*, *Yancheng Baolong Biochemical Prods. Co. v. United States*, 406 F.3d 1377, 1381–82 (Fed. Cir. 2005); *Timken Co. v. United States*, 893 F.2d 337, 338–41 (Fed. Cir. 1990); *Zenith*, 710 F.2d at 810–12; *see also* 19 U.S.C. § 1516a(c)(1)&(2). From this brief survey it is apparent that there are real differences between the cash deposit rate and the liquidation rate.[5]

B.

On December 17, 2003, Commerce initiated an investigation of wooden bedroom furniture exporters/producers from the People's Republic of China ("PRC"). *See Wooden Bedroom Furniture from the People's Republic of China*, 68 Fed. Reg. 70,228 (Dept. Comm. Dec. 18, 2003) (notice of initiation). In its investigation, Commerce rejected as untimely certain information submitted by Decca to prove its independence from state-control.[6] *Wooden Bedroom Furniture from the People's Republic of China*, 69 Fed. Reg. 67,313, 67,313 (Dep't Commerce Nov. 17, 2004) (notice of final determination of sales at less than fair value) ("*Final Determination*") *as amended*, *Wooden Bedroom Furniture from the People's Republic of China*, 70 Fed. Reg. 329 (Dept. Commerce Jan. 4, 2005) (notice of amended final determination of sales at less than fair value and antidumping duty order) ("*Amended Final Determination*"). As a consequence of its decision to reject Decca's evidence as untimely, Commerce assigned Decca the rate it assigned to all importers who did not estab-

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[5] For example, a cash deposit rate is an interim or provisional rate, but a liquidation rate has no effect until it is finally assessed, and a cash deposit rate may be modified during the period while liquidation is suspended, whereas a liquidation rate cannot normally be changed because liquidation occurs only once for each entry.

[6] Because the PRC is a non-market economy ("NME"), in investigations of PRC exporters/producers, Commerce presumes that all companies operating in the PRC are state-controlled until those companies demonstrate independence from government control.

lish independence from state-control, i.e., the "PRC-wide" rate of 198.08%. *Final Determination*, 69 Fed. Reg. at 67,317. Pursuant to this assignment, Commerce instructed Customs to collect cash deposits from Decca at a rate of 198.08%. *Amended Final Determination*, 70 Fed. Reg. at 329.

As permitted under the Statute, 19 U.S.C. § 1516a, in this court, Decca sought review of Commerce's *Final Determination*, asserting that Commerce had failed to notify Decca (a) that it had requested information from Decca and (b) of the deadline by which Decca was required to respond to the information request. *See Decca I*, 29 CIT at ___, 391 F. Supp. 2d at 1303. Because Commerce had failed to adequately provide notice of such requirements to Decca, Decca averred that Commerce had improperly rejected the evidence Decca submitted; Decca further argued that because Commerce's rejection of its evidence was improper, and because this evidence demonstrated that Decca was not in fact state-controlled, Decca was entitled to the "separate" rate of 6.65%, i.e., the rate Commerce assigned all non-mandatory respondents who are independent of PRC control, and that application of the 198.08% PRC-wide rate to Decca was unlawful. *Id.* at 1303–04. This court agreed, in part, finding that Commerce failed to follow its regulations in notifying interested parties of the information requested of them and the deadline for submitting such information. *Id.* at 1316–17 In so holding, the court remanded the case to Commerce to consider whether, despite the fact that Commerce had not followed its regulations, Decca had nevertheless received actual and timely notice of the relevant submissions and deadlines. *Id.* In the event Commerce could not establish that Decca had received notice of the submission requirements, the court ordered Commerce to determine whether Decca was entitled to a separate rate. *Id.* On remand, Commerce found that it was not feasible for it to demonstrate that Decca had received notice of the requested information and the relevant deadline for submitting such information. *See Wooden Bedroom Furniture from the People's Republic of China*, 71 Fed. Reg. 1,511 (Dep't Commerce Jan. 10, 2006) (notice of court decision not in harmony) ("*Notice of Court Decision*"). Commerce further found, after considering Decca's factual filings, that Decca was entitled to the 6.65% separate rate. *Id.*

During the remand proceedings, Decca requested that Commerce amend its instructions to Customs with respect to Decca's cash deposit rate. Despite its remand determination that Decca was entitled to the separate 6.65% rate, Commerce, invoking 19 U.S.C. § 1516a(e),[7] concluded that it was without authority to instruct Customs to apply the separate 6.65% rate as Decca's cash deposit rate until a final and conclusive court decision. *Final Results of Redeter-*

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[7] 19 U.S.C. § 1516a(e) speaks to liquidation. *See infra* at pp. 28–33.

mination Pursuant to Court Remand at 8–9 (Dept. Commerce Nov. 7, 2005) ("*Remand Redetermination*"). Rather, Commerce has left in place its original instructions that Customs apply to Decca the PRC-wide, 198.08% rate, application of which to Decca has been found to be unlawful by this court. Specifically, in the remand determination, Commerce stated that "in accordance with [its] normal practice" it does "not intend to issue amended customs instructions . . . until after it has published an amended final determination." *Remand Redetermination* at 8–9. Commerce further noted that it "will publish an amended final determination once the decision from the Court is final and conclusive."[8] *Id.*

In Decca's comments on Commerce's remand determination, submitted pursuant to this court's opinion and order in *Decca I*, 29 CIT at ___ , 391 F. Supp. 2d at 1317, Decca asked the court to enforce its judgment and thereby order Commerce to amend Decca's cash deposit rates. After considering the parties' comments, and after consultation therewith, the court affirmed Commerce's remand determination with the understanding that Decca could renew its request to enforce the court's judgment after the automatic stay for enforcing the court's judgment expired pursuant to USCIT R. 62(a).[9] *Decca Hospitality Furnishings, LLC v. United States*, 29 CIT ___ , Slip Op. 05–161 (Dec. 20, 2005).

After the court's action, on January 10, 2006, Commerce published a Federal Register Notice announcing that the court had entered judgment in Decca's favor. *Notice of Court Decision*, 71 Fed. Reg. at 1,511.

Although Commerce declined to appeal this court's decision, the Court of Appeals for the Federal Circuit ("Federal Circuit"), on February 23, 2006, docketed an appeal filed by Defendant-Intervenor. Accordingly, pursuant its notice in the Federal Register, Commerce will not amend Decca's cash deposit rate, if at all, until the Federal Circuit issues a final and conclusive decision.

Additionally, on January 3, 2006, Commerce published a notice providing interested parties to the investigation an opportunity to request an administrative review. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation*, 71 Fed. Reg. 89 (Jan. 3, 2006) (notice of opportunity to request administrative review of antidumping or countervailing duty order, finding, or suspended investigation). "[W]ell over 100 companies," including Decca and

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[8] Commerce cites *Timken* 893 F. 2d at 340 n. 6 to support its position. Footnote 6 reads, in part, "We do, however, agree that a decision must be 'final' in the sense that the CIT has entered final judgment in order to require publication of notice under § 1516a(c)(1) and (e)."

[9] Rule 62 provides, in relevant part, "[e]xcept as stated herein or as otherwise ordered by the court, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 30 days after its entry."

Defendant-Intervenor, have submitted requests for an administrative review. Def.'s Resp. Pl.'s Mot. Enforcement of J. at 4. According to Commerce, Decca is entitled to prove its entitlement to a separate rate during the administrative review. Commerce has further represented to the court that should Decca submit, in the administrative review, the same evidence Decca submitted during the remand proceedings, Decca would receive a separate rate in the administrative review.

No party disputes that if Decca does establish its entitlement to a separate rate, Decca will receive a refund, plus interest, of any cash deposit tendered on goods imported during the period of review that exceeds the separate rate as determined by the administrative review. This refund would include all duties that Decca will pay until a final and conclusive court decision has issued.[10]

Decca has maintained to the court that it has attempted to secure credit with which to post a cash deposit, but has been unable to do so because of the extraordinary level of the cash deposit rate Customs currently requires. *See* Def.'s Report Re. Availability of a Bond. Decca claims that because of its current cash deposit rate of 198.08%, and its inability to obtain credit to cover the cash deposit rate, it cannot import goods that are subject to the antidumping duty order into the United States. Therefore, Decca contends, its subject merchandise is effectively excluded from the U.S. market until Commerce amends Decca's cash deposit rate to reflect the court's judgment. Consequently, unless the court directs Commerce to amend Decca's cash deposit rate, according to Decca, Decca is blocked from the U.S. market until a final and conclusive court decision issues.

DISCUSSION

Under the Statute, Commerce's authority and obligation to issue instructions to Customs is a purely ministerial act, to which Decca may be entitled by virtue of Commerce's remand determination. *See* 19 U.S.C. § 1673e(a)(1). After all, this court has determined that application of the 198.08% rate is unlawful. Moreover, Decca claims, there is no rate that can be lawfully applied other than the 6.65% rate.[11] Nonetheless, because Decca's prayer for relief requires the

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[10] Indeed, it appears that the only chance Decca would not receive a separate rate is if Decca misses the filing deadline. The bigger uncertainty is what the separate rate will be. At this point of time, based on Commerce's *Final Determination*, the best estimate is that that rate will be around 6.65%.

[11] As noted above, despite its remand determination that Decca was entitled to the separate 6.65% rate, Commerce, relying on 19 U.S.C. § 1516a(e), concluded that it was without authority to instruct Customs to apply the 6.65% rate as Decca's cash deposit rate until a final and conclusive court decision is issued addressing Defendant-Intervenor's appeal. While the court need not decide this issue because the court's issuance of judgment establishes Commerce's duty, the court notes that Commerce's own remand determination, as a matter of law, replaces Commerce's original, final determination; the statute governing an-

court to take the specific step of ordering Commerce to instruct Customs to lower Decca's cash deposit rate to 6.65%, the court will construe Decca's request as requesting mandamus or injunctive relief in addition to enforcing the court's judgment. Accordingly, it is Decca's request for an order granting this additional relief from Commerce's erroneous cash deposit rate that is at issue here.

The common-law writ of mandamus, as codified in 28 U. S. C. §§ 1361, 1651(a),[12] is a "drastic [remedy], to be invoked only in extraordinary situations." *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980). Because a writ of mandamus is " 'one of the most potent weapons in the judicial arsenal,' " *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004) (quoting *Kerr v. U.S. Dist. Court for the N. Dist. of Cal.*, 426 U.S. 394, 403 (1976)), before such a writ may issue, a party seeking the writ must satisfy three requirements. First, " 'the party seeking issuance of the writ [must] have no other adequate means to attain the relief he [or she] desires.' " *Id.* (quoting *Kerr*, 426 U.S. at 403 (1976)). Second, the "petitioner must satisfy 'the burden of showing that [his or her] right to issuance of the writ is clear and indisputable,' " *Cheney*, 542 U.S. at 381 (quoting *Kerr*, 426 U.S. at 403), i.e., that the defendant owes him or her a "clear nondiscretionary duty," *Heckler v. Ringer*, 466 U.S. 602, 616 (1984). *See also United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 420 (1931) ("[The writ of mandamus] will issue only where the duty to be performed is ministerial and the obligation to act peremptory, and plainly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and indisputable."); *Roberts v. United States*, 176 U.S. 221, 231 (1900) ("Every statute to some extent requires construction by the public officer whose duties may be defined therein. . . . But that does not necessarily . . . make the duty of the officer anything other than a purely ministerial

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tidumping duty orders that are required to follow from such determinations, 19 U.S.C. § 1673e(a)(1), specifically provides that Commerce shall publish an order which "directs customs to assess an antidumping duty" in the amount calculated and "requires the deposit of estimated antidumping duties. . . ." Commerce fails to offer any good reason why 19 U.S.C. § 1673e(a)(1) does not apply to Commerce's remand determination.

[12] Pursuant to 28 U.S.C. § 1585, "[t]he Court of International Trade, shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States." *See also* 28 U.S.C. § 2643(c)(1). As is relevant here, the district courts have authority to grant writs of mandamus (perhaps more appropriately termed mandamus-like relief in accordance with Fed. R. Civ. Pro. 81(b)) under 28 U.S.C. §§ 1361 & 1651(a). *See* 28 U.S.C. § 1361 ("The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."); 28 U.S.C. §1651(a) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.").

This court's jurisdiction over Plaintiff's request for mandamus is not dispossessed by Defendant-Intervenor's notice of appeal. On the contrary, Fed. R. App. P.8(a)(1) provides for the submission of requests for such injunctive relief, which includes mandamus, in the first instance, to be made to the district court.

one."); *13th Regional Corp. v. U.S. Dep't of Interior*, 654 F.2d 758, 760 (D.C. Cir. 1980). Third, "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Cheney*, 542 U.S. at 381 (citing *Kerr*, 426 U.S. at 403 ("Moreover, it is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed.")). *See also Duncan Townsite Co. v. Lane*, 245 U.S. 308, 312 (1917) ("although classed as a legal remedy, [the] issuance [of a writ of mandamus] is largely controlled by equitable principles.").[13] The court will address each requirement in turn.

(A) Availability of Adequate Alternative Remedies[14]

In order for a writ of mandamus to issue, a complaining party must demonstrate that he or she does not have adequate alternative means to obtain relief. Defendants claim that Decca does have an alternative means to obtain relief.[15] Specifically, Defendants argue that, at the time of liquidation, Decca will receive a refund for an overpayment of cash deposits it makes. Therefore, so the argument goes, liquidation provides an adequate alternative remedy. Under the circumstances of this case, the court disagrees.

Normally, an aggrieved party may obtain effective relief from an erroneous cash deposit rate at the time of liquidation. As noted above, the Statute provides for the payment of interest upon liquida-

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[13] In *Cheney*, the Supreme Court noted that a "District Court's analysis of whether mandamus relief is appropriate should itself be constrained by principles similar to those" outlined above. *Cheney*, 342 U.S. at 390–91. This iteration of the test, therefore, must replace the Federal Circuit's prior articulation of this test. *See, e.g., Timken*, 893 F.2d at 339. Because the court in *Cheney* was considering a writ of mandamus as against a district court judge – thereby implicating the final judgment rule and other like considerations — the principles underlying issuance of mandamus here are more generous than as articulated above.

[14] Defendant-Intervenor argues: "Decca seeks to circumvent the requirement that it demonstrate that it is irreparably harmed by the application of the cash deposit rate determined in the investigation until a final and conclusive decision in this appeal." *Def.-Int.'s Resp. Pl.'s Application Writ of Mandamus* at 7. This argument has already been *squarely* rejected by the Federal Circuit. As the court held in *Timken*, 893 F.2d at 342:

> As a final matter, the third element of a mandamus action, the lack of an adequate alternative remedy, was met in this case. Commerce suggests that as an alternative remedy, Timken could have sought an injunction pursuant to 19 U.S.C. § 1516a(c)(2). We do not, however, consider such an alternative remedy to be adequate, since Timken would be required to prove that an injunction was appropriate under the circumstances. *Zenith Radio Corp. v. United States*, 710 F.2d 806 (Fed. Cir. 1983). Timken should not be required to present such proof, since it already has a clear statutory right to the claimed relief.

Nor, as the court held in *Timken*, is Decca required to demonstrate irreparable harm as Defendant-Intervenor argues. *Id.* at 339.

[15] As noted above, enforcement of the court's judgment cannot provide an adequate alternative remedy because it does not result in an order requiring Commerce to correct its instructions to Customs.

tion if the cash deposit rate is different than the actual dumping margin determined either by a final and conclusive court decision or an administrative review. *See* 19 U.S.C. §§ 1673f(b), 1677g. As a result, under this regime, theoretically, an importer should be no more disinclined to import goods into the United States under the threat that an appeal (or administrative review) will reinstate a prior cash deposit rate than it would if it were required to pay the original, albeit erroneous, cash deposit. As such, in many cases, at least theoretically, there may be no reason to grant parties relief from a cash deposit rate determined to be erroneous by the court's review of Commerce's final determination because liquidation, with interest, after a final and conclusive court decision, will provide relief.

Nevertheless, theory and reality are not always the same. Significantly, given the complexity of U.S. trade laws, an importer's creditors may not understand the risks involved in providing credit and, consequently, may decline to provide credit where it is otherwise efficient to so provide. Alternatively, creditors may demand a high rate of interest to cover what they perceive as a high risk investment. This may have a chilling effect on importers as they may be unable to secure the necessary credit to cover the erroneous cash deposit rate pending a final and conclusive court decision or an administrative review. Therefore, unless the court grants relief in some cases, importers may be harmed by an unlawful cash deposit rate while the matter is being reviewed. *See, e.g., Queen's Flowers de Colom. v. United States*, 20 CIT 1122, 1125–28, 947 F. Supp. 503, 506–07 (1996); *NSK Ltd. v. United States*, 19 CIT 1013, 1031–32, 896 F. Supp. 1263, 1278 (1995) ("*NSK II*")(remanding to Commerce to consider whether circumstances would justify refunding cash deposits prior to liquidation);[16] *Chilean Nitrate Corp. v. United States*, 11 CIT 538, 540 & 540 n.2 (1987).

Decca clearly falls in the latter camp. Currently, Commerce requires Decca to post a 198.08% cash deposit – a rate almost thirty times that found lawful by the court (and now Commerce). Faced with such a rate, Decca has further maintained that its current cash deposit rate excludes it from the U.S. market. No party has offered any *evidence* to contest this assertion (evidence of which would be readily obtainable from Customs). *Cf.* USCIT R. 11 (denials of factual allegations must have reasonable support). Therefore, given that Decca is excluded from the market because of the application of the PRC-wide cash deposit rate, offering Decca a refund of cash deposits that it would have to pay on goods it cannot bring into the country is hardly a remedy at all.

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[16] Defendant-Intervenor cites *NSK Ltd. v. United States*, 17 CIT 500, 501 (1993), for the alternate proposition. This analysis was superceded by *NSK II*, 19 CIT at 1031–32, 896 F. Supp. at 1278, vacated in part *NSK Ltd. v. United States*, 21 CIT 1006 (1997).

(B) Commerce's Duty

Under the second requirement of mandamus, Decca must demonstrate that Commerce has a clear, rather than discretionary, duty. The question of whether Decca has asserted a clear duty on the part of the defendant turns, at least in part, on the proper construction of 19 U.S.C. § 1516a(c)(1)[17] ("Section 1516a(c)(1)"); therefore, the court must begin by reviewing existing authority on the interpretation of that provision.

In *NTN Bearing Corp. of Am. v. United States*, 13 CIT 91, 705 F. Supp. 594 (1989), plaintiff, NTN Bearing Corporation ("NTN"), challenged various decisions by Commerce before this court namely: (1) whether certain of its products were included within the scope of an antidumping duty order; (2) whether Commerce's decision was supported by substantial evidence with respect to the merchandise properly falling within the scope of the order; and (3) additional clerical errors in the computation of the duty margin of merchandise falling within the scope of the order. *See NTN Bearing Corp. of Am. v. United States*, 892 F.2d 1004, 1005 (Fed. Cir. 1989) ("*NTN Bearing*"). The parties cross-moved for partial summary judgment with regard to the first question. After granting NTN's motion for partial summary judgment, this court forbade "further collection of estimated dumping duties on [the merchandise found outside the scope of the order] and [ ] order[ed] return of duties previously collected on such [merchandise]." *Id.* On appeal, the Federal Circuit vacated this court's injunction. Although recognizing this Court's "broad injunctive powers," the Federal Circuit held that "[a]bsent a final court decision in its favor, NTN has no right to the injunctive relief granted here." *Id.* at 1006.

In explaining its decision in *NTN Bearing*, the Federal Circuit opined:

> As was said in *Melamine Chemicals, Inc. v. United States*, 732 F.2d 924, 934 (Fed. Cir. 1984) (emphasis in original) "The administrative handling of the involved entries of [merchandise] can be [a]ffected only by (1) a preliminary injunction pursuant to 19 U.S.C. § 1516a(c)(2) or (2) a *final* court decision adjudi-

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[17] Title 19 Section 1516a(c)(1) provides:

Unless such liquidation is enjoined by the court under paragraph (2) of this subsection, entries of merchandise of the character covered by a determination of the Secretary, the administering authority, or the Commission contested under subsection (a) of this section shall be liquidated in accordance with the determination of the Secretary, the administering authority, or the Commission, if they are entered, or withdrawn from warehouse, for consumption on or before the date of publication in the Federal Register by the Secretary or the administering authority of a notice of a decision of the United States Court of International Trade, or of the United States Court of Appeals for the Federal Circuit, not in harmony with that determination. Such notice of a decision shall be published within ten days from the date of the issuance of the court decision.

> cating the legality, *vel non*, of the challenged determination. 19 U.S.C. 1516[a](e)." Before a final court decision, therefore, the agency determination governs entry of merchandise. 19 U.S.C. § 1516a(c)(1)(1988).
>
> A partial summary judgment is not a final decision. Hence the trial court's instructions respecting duties constituted an improper attempt to affect the administrating handling of entries prior to any final court decision. Following an affirmative agency finding of dumping, estimated duties are to be collected pending liquidation. 19 U.S.C. § 1516(b),(f) (1988); 19 C.F.R. § 353.39(e),.48(c)(1989). Because the agency determination requiring deposit of estimated antidumping duties operates until a final court decision adverse to that of the agency, estimated duties are properly collectable from NTN.

Id. (footnotes omitted) (emphasis in original).

Thus, under the Federal Circuit's reasoning in *NTN Bearing*, this court can order no adjustment to a cash deposit rate prior to a "final court decision." *Id.* In the case at issue here, all parties (more or less) acknowledge that this language from *NTN Bearing* is determinative; nonetheless, the parties disagree as to what this language means.

The disagreement stems from the fact that the phrase "final court decision" has multiple meanings. Commerce avers that "final court decision," as used in *NTN Bearing*, refers to a "conclusive court decision." For this proposition, Commerce cites various decisions interpreting Congress' use of the phrase "final court decision" in Section 1516a(e). *See, e.g., Yancheng Baolong Biochemical Prods. Co.*, 406 F.3d at 1381-82 (preliminary injunction on liquidation of entries remains until a final and conclusive court decision); *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1379 (Fed. Cir. 2002) (finding that a preliminary injunction dissolves upon issuance of a final and conclusive court opinion); *Hosiden Corp. v. United States*, 85 F.3d 589, 591 (Fed. Cir. 1996) ("The Court of International Trade does not have discretion to require liquidation before the final decision on appeal. 19 U.S.C. § 1516a(e) requires that liquidation, once enjoined, remains suspended until there is a "conclusive court decision which decides the matter, so that subsequent entries can be liquidated in accordance with that conclusive decision." (quoting *Timken*, 893 F.2d at 342)); *Smith Corona Corp. v. United States*, 915 F.2d 683, 688 (Fed. Cir. 1990) ("suspension is not automatically lifted when the decision of the Court of International Trade is appealed to the Federal Circuit. Suspension of liquidation continues until a 'conclusive' court decision is reached, i.e., a decision that is not subject to further appeal or collateral attack.").

In opposition, Decca asserts that the phrase "final court decision" as used in *NTN Bearing*, means a final court decision of the Court of International Trade, i.e., a decision for which judgment has issued.

Decca makes this claim by relying on decisions interpreting Congress' use of the phrase "court decision" in Sections 1516a(c)(1) and (e). *See, e.g., Smith Corona Corp.*, 915 F.2d at 688; *Timken*, 893 F.2d at 340.

The question is: To which definition was the *NTN Bearing* court referring?[18] As noted above, the *NTN Bearing* court held that "[b]efore a final court decision, therefore, the agency determination governs entry of merchandise." *NTN Bearing*, 892 F.2d at 1006. Although declining to define the phrase "final court decision," *id.* at 1006 n.4, the court cited *19 U.S.C. § 1516a(c)(1)* as to the phrase's import and meaning. *NTN Bearing*, 892 F.2d at 1006. A year later, the Federal Circuit held that Section 1516a(c)(1) was activated upon the "issuance of the [CIT] court decision." *Timken*, 893 F.2d at 340 (citing 19 U.S.C. § 1516a(c)(1)). Contrasting Congress' use of "court decision" in Sections 1516a(c)(1) and (e) with Congress' use of "final court decision" in 19 U.S.C. § 1516a(e) ("Section 1516a(e)"), the *Timken* Court held that a "court decision," as used in Sections 1516a(c)(1) and (e), was any decision for which judgment had issued. *Timken*, 893 F.2d at 340; *see also Smith Corona Corp.*, 915 F.2d at 688 ("This provision makes clear that the decision of the Court of International Trade, or of the Federal Circuit, is of controlling effect

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[18] It appears that this court has not provided an entirely consistent explanation of this statutory language, perhaps awaiting further appellate guidance. *Compare Olympia Indus.*, 30 CIT ____, Slip. Op. 06–4 (Eaton, J.) (denying motion to enjoin cash deposit because plaintiff failed to establish irreparable harm); *Shandong Huarong Gen. Group Corp. v. United States*, 24 CIT 1286, 1292–93, 122 F. Supp. 2d 143,148–49 (2000) (Carman J.) (finding no irreparable harm and that "paying deposits pending Court review is an ordinary consequence of the statutory scheme."); *Shree Rama Enters. v. United States*, 21 CIT 1165, 1166, 983 F. Supp. 192, 194 (DiCarlo, J.) (where irreparable harm can be shown, grant of an injunction appropriate); *Queen's Flowers de Colombia v. United States*, 20 CIT 1122, 1125–28, 947 F. Supp. 503, 509 (1996) (Pogue, J.) (enjoining cash deposit where firms would enter bankruptcy without injunction); *Inland Steel Bar Co. v. United States*, 18 CIT 14, 16, 843 F. Supp. 1477, 1479 (1994) (Carman, J.) (finding that this court could not, until a final judgment, order Commerce to adjust a cash deposit rate where Commerce had requested a voluntary remand and the remand results determined a different cash deposit rate); *Companhia Brasileira Carbureto de Calcio v. United States*, 18 CIT 215, 216 (1994) (Restani, J.) ("court decisions rendered pursuant to § 1581(c) do not change the cash deposit rates until the final court decision is issued" but considering motion for injunctive relief); *Jeumont Schneider Transformateurs v. United States*, 18 CIT 647, 652–53 (1994) (Restani, J.) (a change in the cash deposit rate must await finalized judicial review); *Federal-Mogul Corp. v. United States*, 17 CIT 722, 726, 826 F. Supp. 1442, 1446 (1993) (Tsoucalas, J.) ("This Court agrees that in order to [amend the cash deposit rate] the Court must enter final judgment on this issue pursuant to Rule 54(b)."), *Consol. Int'l Auto., Inc. v. United States*, 16 CIT 269, 269–70 (1992) (Restani, J.) (ordering the immediate change in the deposit rate even though the sixty-day period for appeal had not yet expired), *Chilean Nitrate Corp.*, 11 CIT at 540 n.2 (1987) (Restani, J.) ("The court rejects defendant's argument that the requirement of cash deposits cannot be enjoined, or that it would not be in the public interest to enjoin the cash deposit requirement, because of the legislative history indicating the need for cash deposits."); *Badger-Powhatan, Div. of Figgie Int'l, Inc. v. United States*, 10 CIT 241, 250, 633 F. Supp. 1364, 1373 (1986) (Restani, J.) (where Commerce requested voluntary remand "[t]here is no room here for a result which would allow the erroneous deposit rate to continue").

when rendered, and that each such decision must be published within ten days after its issuance."). Thus, by relying on Section 1516a(c)(1) as the statutory bar to the *NTN Bearing* trial court's injunction, *NTN Bearing* merely held that the administrative determination governs until the Court of International Trade enters a final judgment. *Cf. Timken*, 893 F.2d at 340 n.6 ("We do, however, agree that a decision must be 'final' in the sense that the CIT has entered final judgment in order to require publication of notice under [§]§ 1516a(c)(1) and (e)."). In this matter, because this court has issued a final judgment adverse to Commerce's original determination — in contrast to the trial court in *NTN Bearing* granting only a motion for partial summary judgment — nothing in *NTN Bearing* contradicts Decca's claim for relief here.[19]

This analysis, by itself, merely means that *NTN Bearing* does not foreclose relief; it does not necessarily mean that Decca is entitled to relief. It does mean, however, that the law does not limit Commerce's clear duty to comply with a judgment of the Court of International Trade. *See Porto Rico v. Rosaly*, 227 U.S. 270, 276 (1913) (the judicial power "confers the authority and imposes the duty to enforce a judgment rendered in the exercise of [that] power."); *ICC v. Brimson*, 154 U.S. 447, 484 (1894); *Am. Grape Growers Alliance for Fair Trade v. United States*, 9 CIT 568, 570, 622 F. Supp. 295, 297 (1985) (highlighting the need for timely enforcement of CIT judgments); *cf. Borlem S.A.-Empreedimentos Industriais v. United States*, 913 F.2d 933, 940 (Fed. Cir. 1990) (noting that the *NTN Bearing* trial court lacked authority because of a specific statutory bar). Moreover, the *NTN Bearing* court's reliance on Section 1516a(c)(1), when considered within context of the Statute and other decisions, does lead to the additional conclusion that Commerce has a clear duty to implement the requested lawful cash deposit rate.

Under Section 1516a(c)(1), Commerce is required to publish in the Federal Register a "notice of a decision of the United States Court of International Trade, or of the United States Court of Appeals for the

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[19] One may wonder why the *NTN Bearing* court used the phrase "final court decision" when it drew support from Section 1516a(c)(1) for its analysis. First, the distinction between a "court decision" and a "final court decision" had not yet been drawn – nor had either term been defined when *NTN Bearing* was decided. Second, in *NTN Bearing*, the Court of International Trade never entered final judgment. *NTN Bearing* relied heavily on *Melamine Chems., Inc. v. United States*, 732 F.2d 924, 934 (Fed. Cir. 1984). The Court of International Trade in *Melamine Chems.* likewise had not entered a judgment before granting relief. *See Timken*, 893 F.2d at 341 (noting that this court had only remanded the case). Therefore, as the court maintained in *Timken*, 893 F.2d at 341, the use of the term "final court decision," at least in *Melamine*, was to signal that a non-final decision of the Court of International Trade did not have immediate effect on the cash deposit rate, e.g., grants of partial summary judgment and remands. Rather, the *Timken* court held that the phrase's import and meaning as used in its case law must be defined in relation to the statutory provision it references. Accordingly, because *NTN Bearing* referenced 1516a(c)(1) to justify its use of the phrase "final court decision," the court in *NTN Bearing* held only that the bar on altering the rate of cash deposits operates until this court issues judgment.

Federal Circuit, not in harmony with [the agency's appealed] determination . . . within ten days from the date of the issuance of the court decision."[20] The court notes in particular that the Federal Circuit has held that this responsibility ensues *upon the issuance* of a final judgment by this court. *Timken*, 893 F. Supp. at 340. The Federal Circuit has also held that this notice has legal consequences. Specifically, such publication suspends liquidation under the original determination pending a final court decision (if not already suspended), *see Smith Corona Corp.*, 915 F.2d at 688, and requires collection of cash deposits prospectively in accordance with Commerce's *new* determination, *see Timken*, 893 F.2d at 340 n.3 ("Thus, in the present case, liquidation of CMEC's entries is currently taking place without assessment of antidumping duties, but would be suspended and made subject to collection of estimated antidumping duties of 4.69% upon publication of notice of the March 22, 1989 CIT decision."). Given that Commerce has published such a notice here, Decca is entitled to the benefits that flow from the issuance of such a notice, i.e., Commerce's duty to implement it. This much is specifically required by *Timken*. *See Timken*, 893 F.2d at 340 ("the agency's determination will govern only that merchandise which is 'entered prior to the *first decision of a court* which is adverse to that determination." quoting H.R. Rep. No. 317, 96th Cong., 1st 182 (1979) (emphasis in original)).

Commerce appears to reject this analysis claiming that *liquidation* is not effected until a "final court decision," i.e., one for which appeals have lapsed. *See* 19 U.S.C. § 1516a(e). While the truth of this proposition is undeniable, its significance in the case at bar is wanting.[21] Liquidation is not the same thing as the collection of cash deposits. *See, e.g., Torrington Co.*, 44 F.3d at 1578–79; *Timken*, 893 F.2d 338–39; *Zenith*, 710 F.2d at 810 ("Any change in deposit amounts that might be required would be transient and could not affect the amount of dumping duty actually assessed. . . ."); *Shree Rama Enters.*, 21 CIT at 1166, 983 F. Supp. at 194; *Consol. Int'l Automotive, Inc.*, 16 CIT at 269–70. Indeed, the Statute refers to each distinctly. *Compare* 19 U.S.C. §§ 1673b(d), 1673d(c)(1)(B)(ii), 1673e(a), 1673e(c)(3), 1675, 1673f(b)(2) *and* 1677g (referring to cash deposits) *with* 19 U.S.C. §§ 1500, 1504, 1505, 1514, 1516a *and* 1520 (referring to liquidations). Therefore, neither Commerce nor this court should presume that Congress meant to address cash deposits

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[20] As noted above, Commerce has published such a notice of the court's judgment at issue here, in its *Notice of Court Decision*, 71 Fed. Reg. 1,511.

[21] Commerce is correct insofar as Customs is not required to return *previously paid* cash deposits until liquidation. Liquidation is the only procedure to refund any overpayments. *NTN Bearing*, 892 F.2d at 1006 ("return of estimated duties must await a final court decision and liquidation by the agency in accordance with that decision."); *see also* 19 U.S.C. §§ 1673f(b)(2), 1677g.

when it employed the term "liquidation" in 19 U.S.C. § 1516a. *See* 2A Norman J. Singer, *Statutes and Statutory Construction* § 46:06, p. 194 (6th ed. 2000) ("when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended."); *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 13 F.3d 398, 401 (Fed. Cir. 1994); *Timken*, 893 F.2d 340 ("It follows that if a word is used in one phrase but omitted in another, the two phrases are intended to mean something different."). As such, that Customs may only liquidate certain entries in accordance with a final and conclusive decision has no bearing on Customs' responsibilities as to the collection of cash deposits.

In a larger sense, there is good reason why the Statute differentiates between liquidation and the collection of cash deposits. As recounted above, this court usually suspends liquidation pending court proceedings either by virtue of a preliminary injunction or a court decision not in harmony with the agency determination. *See* 19 U.S.C. §§ 1516a(c)(1)&(2). *See also Zenith*, 710 F.2d at 810. Therefore, if Section 1516a(e) were activated on the basis of every decision (conclusive or otherwise) several different instructions may issue for entries on which no liquidation is occurring. The issuance of these multiple liquidation instructions would have no utility. Furthermore, without such a stay, parties would not get relief (for goods already entered) from errors committed by Commerce or this court as determined in a final and conclusive decision – a result at odds with the purpose behind appellate review. *See Zenith*, 710 F.2d at 810.

In contrast, the collection of cash deposits is ongoing. As a result, revised Customs' instructions with regard to cash deposits will have immediate and ongoing consequences. In addition, because cash deposits are estimates of the eventual liability an importer will bear, the remand determination reflects the best estimate of what that liability will be. *Cf. Timken*, 893 F.2d at 338 n. 3 & 342; *Allegheny Ludlum Corp.*, 346 F.3d at 1373 ("In short, we discern a congressional intent that cash deposit rates be accurate and current. . . ."). Nor will a change in the cash deposit rate interfere with the Federal Circuit's ability to grant parties relief. It is therefore reasonable to collect cash deposits based on Commerce's best estimate of the importer's liability. Without question, these pragmatic considerations weigh against the administrative costs in issuing multiple instructions. *Compare Borlem S.A.-Empreedimentos Industriais*, 913 F.2d at 939 (noting that avoiding ping-pong and endless renvoi between the court, the Federal Circuit, and agencies may be a relevant consideration in denying relief but is not dispositive) *and Timken*, 893 F.2d at 342 (noting that this concern does not apply to publishing

federal register notices) *with Melamine Chems.*, 732 F.2d at 934 (citing concern of the yo-yo effect). *See also supra* at note 20.[22]

The issue has been decided. As established by *Timken*, Commerce has a clear duty to implement the cash deposit rate required by the court's grant of judgment affirming Commerce's remand determination, and Decca has a clear right to the requested writ.

(C) Appropriate under the Circumstances

Last, the court must consider whether relief is appropriate under the circumstances present here. Commerce asserts that this court's equitable powers are limited by 19 U.S.C. §§ 1516a(c)(2)&(e) in the case at bar, so as to foreclose relief to Decca here. Sections 1516a(c)&(e), however, define the court's authority as to the *liquidation* of entries. Specifically, as noted above, Section 1516a(c)(2)[23] permits the court to preliminarily enjoin the liquidation of entries pending judicial review. This authority is consistent with the recognition that liquidation is final and conclusive upon the parties and, therefore, if the court's review authority is to be meaningful, such injunctions must issue or else no relief (for the imports in question) may be granted. *See Zenith*, 710 F.2d at 810–11. *See generally McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, Fla. Dept. of Bus. Regulation*, 496 U.S. 18, 51 (1990); *South Carolina v. Regan*, 465 U.S. 367, 381 n.19 (1984); *Ohio Oil Co. v. Conway*, 279 U.S. 813, 815 (1929) (where a party may not receive a refund once a tax is paid, a preliminary injunction should issue). Once the judicial process has been exhausted, Section 1516a(e)[24] requires Commerce to *liquidate* all future entries, and entries for which liquidations were enjoined

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[22] As noted above, because it is not impossible that this court's first decision may be overturned, an importer still faces some risk that the original cash deposit rate will be reinstated. Therefore, an importer's risk calculus is the same regardless of the cash deposit rate assigned. However, as discussed above, an importer may encounter significant transaction costs depending on the cash deposit rate. As the prevailing party before this court, there is no reason why an importer should continue to shoulder these transaction costs after this court has entered judgment in favor of the importer. *Cf. Am. Hosp. Supply Corp. v. Hosp. Prods., Ltd.*, 780 F.2d 589, 593–96 (7th Cir. 1985) (Posner, J.).

[23] Title 19 Sections 1516a(c)(2)–(3) provide:

Injunctive relief. In the case of a determination described in paragraph (2) of subsection (a) by the Secretary, the administering authority, or the Commission, the United States Court of International Trade may enjoin the liquidation of some or all entries of merchandise covered by a determination of the Secretary, the administering authority, or the Commission, upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances. (3) Remand for final disposition. If the final disposition of an action brought under this section is not in harmony with the published determination of the Secretary, the administering authority, or the Commission, the matter shall be remanded to the Secretary, the administering authority, or the Commission, as appropriate, for disposition consistent with the final disposition of the court.

[24] Title 19 Section 1516a(e) provides:

Liquidation in accordance with final decision

under Section 1516a(c), in accordance with the final decision. Therefore, as noted, the provision upon which Commerce relies speaks only to the *liquidation* of entries; they do not speak to the handling of cash deposits during court proceedings or as a result thereof.

Moreover, when the Court of International Trade properly asserts jurisdiction over a claim, the Court's equitable powers may be exercised unless precluded by statute. *See, e.g., Borlem S.A.-Empreedimentos Industriais*, 913 F.2d at 937–40; *Shree Rama Enters.*, 21 CIT at 1166, 983 F. Supp. at 194; *cf. Nat'l Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1550–60 (Fed. Cir. 1988) (holding that the court may not grant equitable relief where it does not have jurisdiction). *See generally* 28 U.S.C. § 1585 (conferring the Court of International Trade all powers in law and equity).

Finally, and importantly, given the low probability that Decca's goods will be liquidated at the extraordinary 198.08% rate, and Commerce's decision not to appeal this court's decision, *cf. Dows v. City of Chi.*, 78 U.S. (11 Wall.) 108, 110 (1870), granting relief is appropriate here.

CONCLUSION

For the foregoing reasons, Decca's motion for mandamus is granted.

If the cause of action is sustained in whole or in part by a decision of the United States Court of International Trade or of the United States Court of Appeals for the Federal Circuit

(1) entries of merchandise of the character covered by the published determination of the Secretary, the administering authority, or the Commission, which is entered, or withdrawn from warehouse, for consumption after the date of publication in the Federal Register by the Secretary or the administering authority of a notice of the court decision, and

(2) entries, the liquidation of which was enjoined under subsection (c)(2) of this section, shall be liquidated in accordance with the final court decision in the action. Such notice of the court decision shall be published within ten days from the date of the issuance of the court decision.

Slip Op. 06–44

GUANGZHOU MARIA YEE FURNISHINGS, LTD., *et al.* Plaintiffs, v. UNITED STATES, Defendant, AMERICAN FURNITURE MANUFACTURERS COMMITTEE FOR FAIR TRADE, *et al.* Defendant-Intervenors.

Before: Pogue, Judge
Court No. 05–00065

JUDGMENT

In *Wooden Bedroom Furniture from the People's Republic of China*, 69 Fed. Reg. 67,313 (Dep't Commerce Nov. 17, 2004) (notice of final determination of sales at less than fair market value and antidumping duty order) and its corresponding "Issues & Decision Memorandum" dated November 4, 2004, the Department of Commerce ("Commerce") rejected as untimely certain submissions from Guangzhou Maria Yee Furnishings, Ltd., Pyla HK Ltd., and Maria Yee Inc. (collectively "Maria Yee") and, therefore, assessed Maria Yee the People's Republic of China ("PRC")-wide cash deposit rate of 198.08%. Maria Yee timely appealed that determination averring that it was improperly denied the separate rate of 6.65%. On December 14, 2005, this court found unlawful Commerce's assessment of the PRC-wide cash deposit rate, based upon Commerce's unreasonable reliance on notice to be provided through the Chinese Ministry of Commerce ("MOFCOM"), and remanded the issue to Commerce for reconsideration. *Guangzhou Maria Yee Furnishings, Ltd. v. United States*, 29 CIT ___ , Slip Op. 2005–158 (2005).

Pursuant to that remand order, Commerce issued a remand determination on March 1, 2006, in which it considered Maria Yee's evidence. Commerce determined that Maria Yee did qualify for separate-rate treatment, in accordance with the court's decision, and specifically was qualified for the 6.65% separate rate.

This court, having received and reviewed Commerce's Remand Results, comments and rebuttals thereto, finds that Commerce duly complied with the court's remand order. Therefore, it is hereby

ORDERED that the Department of Commerce's remand determination is supported by substantial evidence, and otherwise in accordance with law; and it is further

ORDERED that the Remand Results filed by Commerce on March 1, 2006 are affirmed in their entirety.

Slip Op. 06–45

NANCY EBERT, Plaintiff, v. UNITED STATES SECRETARY OF AGRICULTURE, Defendant.

Before: Pogue, Judge
Court No. 05–00297

ORDER AND JUDGMENT

On January 17, 2006, this court issued an Order to Show Cause why the captioned case should not be dismissed for want of prosecution. The court established February 10, 2006 as the deadline for Plaintiff to establish such good cause for why this action should not be dismissed. Having received no showing of good cause by the Plaintiff, it is hereby

ORDERED that Plaintiff's complaint be, and hereby is, dismissed with prejudice.

Slip Op. 06–46

HYUNDAI ELECTRONICS INDUSTRIES CO., LTD. and HYUNDAI ELECTRONICS AMERICA, INC., Plaintiffs, v. UNITED STATES, Defendant, and MICRON TECHNOLOGY, INC., Defendant-Intervenor.

Before: Richard W. Goldberg, Senior Judge
Cons. Court No. 00–01–00027

JUDGMENT ORDER

Upon consideration of the United States Department of Commerce's Final Results of Redetermination Pursuant to Remand ("Redetermination Results") filed pursuant to the Court's decision in *Hyundai Electronics Industries Co., Ltd. v. United States*, 30 CIT ___, Slip Op. 06–9 (Jan. 18, 2006); and upon consideration of the fact that no parties have filed negative comments regarding the Redetermination Results; and upon consideration of all other papers filed herein; and upon due deliberation, it is hereby

ORDERED that the Redetermination Results are sustained in all respects.

SO ORDERED.

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